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V. 3436

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RONNIE ARNOLD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

FILED

FEB 28 1967

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IN THE UNITED STATES COURT OF APPEALS
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RONNIE ARNOLD,

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vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

The appellant, Ronnie Arnold, was indicted by the Federal Grand Jury for the Central Division of the Southern District of California on January 12, 1966. The indictment was brought under 18 U.S.C. Section 2113(a) and charged that the appellant, along with Renee Thelma Meyers, by force and violence and by intimidation, knowingly and wilfully took from Sue Beaulieu \$659.00 belonging to, and in the care, custody, control, management and possession of the Security First National Bank, Walnut Park Branch.

The case proceeded to trial before the Honorable Irving Hill on February 14, 1966, and was concluded on February 16, 1966. The Court found appellant guilty as charged in the indictment [C. T. 13]. ^{1/}

On March 11, 1966, appellant was sentenced to 20 years, the maximum period as prescribed by law, and for a study pursuant to 18 U.S.C. Section 4208(c) [C. T. 13]. On June 28, 1966, appellant's sentence was modified and appellant was sentenced under the Federal Youth Corrections Act, 18 U.S.C. Section 5010(c), for a period of eight years or until discharged by the Federal Youth Correction Division of the Board of Parole as provided in 18 U.S.C. Section 5017(d) [C. T. 14].

Appellant's Notice of Appeal was timely filed on March 18, 1966 [C. T. 15].

The jurisdiction of the District Court was based upon Title 18 U.S.C. Section 2113(a), Title 18, U.S.C. Section 3231 and Rule 18 of the Federal Rules of Criminal Procedure. This Court has jurisdiction pursuant to Title 28, U.S.C. Sections 1291 and 1294 and Rule 37(a) of the Federal Rules of Criminal Procedure.

II

STATUTE INVOLVED

The indictment was brought under 18 U.S.C. Section

^{1/} "C. T." refers to Clerk's Transcript of Record.

2113(a), which provides in pertinent part as follows:

"Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank or any savings and loan association

" . . .

"Shall be fined not more than \$5,000 or imprisoned not more than twenty years, or both."

18 U. S. C. Section 2 provides:

"(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

III

QUESTIONS PRESENTED

A. Was There Sufficient Probable Cause to Sustain Appellant's Initial Detention and Subsequent Arrest?

B. Were Appellant's Statements Properly Admitted Into Evidence?

C. Was the Evidence Sufficient to Sustain Appellant's

Conviction?

D. Was a Common Plan or Scheme Established?

E. Was the Cross-Examination of Renee Jackson

Proper?

IV

STATEMENT OF FACTS

On November 4, 1965, the Security First National Bank, Walnut Park Branch, was robbed of \$659.00. Just prior to the robbery, at about 12:00 noon, the Operations Officer of the bank, Edward Baker, exited the bank via the rear door and observed a male negro, later identified as the appellant, walking through the alley behind the bank [R. T. 39]. ^{2/} Approximately 5 minutes thereafter Mr. Baker observed appellant enter the front door of the bank and speak to one of the tellers. Appellant was then observed walking across the lobby towards the new accounts department [R. T. 42].

Appellant approached the new accounts teller Ina Yokley and asked to open a new account [R. T. 86]. Mrs. Yokley handed appellant a card and asked him to sign his name and fill in certain information. Appellant asked Mrs. Yokley whether he could fill in the card at the center counter; Mrs. Yokley requested that he fill in the card in her presence. Appellant proceeded to write his

^{2/} "R. T." refers to Reporter's Transcript.

name very slowly and in a nervous manner [R. T. 87]. The process consumed a long time because appellant did not write all the time. He turned around and looked to his left [R. T. 88]. Appellant then stated that he had spoiled the first card and requested another. Mrs. Yokley then handed the appellant another signature card and he started to fill in this second card [R. T. 88, 89].

While appellant was talking with Mrs. Yokley, Renee Thelma Jackson entered the bank. As Renee Jackson walked through the bank to the window of teller Sue Beaulieu, she saw appellant and recognized him [R. T. 177, 178]. She then proceeded to hand teller Sue Beaulieu a demand note which stated in part:

"any mistake youl die first bieeing watched"

The teller proceeded to hand Renee Meyers \$659.00, whereupon Mrs. Meyers hurriedly exited the bank via the front door. At just about the same time that Renee Meyers was exiting the bank, Mrs. Yokley told appellant that he could not open an account without identification. Appellant said "Okay", and walked out the front door of the bank approximately one and one-half minutes after Renee Meyers had exited [R. T. 89, 94]. During the course of appellant's transactions with Mrs. Yokley, he never completed filling in either of the signature cards [R. T. 89]. Appellant signed the same name to both cards: "Ronald Jones." [R. T. 90].

As Renee Meyers exited the bank Mr. Baker was made aware that a robbery had just occurred and he proceeded to sound the alarm. Thereafter he chased Renee Meyers out of the bank. Mr. Baker saw Renee Meyers apprehended around the corner from

the bank. He then returned to the bank and while inside had a brief conversation with a bank customer, Mrs. Black [R. T. 110]. Mrs. Black told Mr. Baker that "There's another one in the bank" [R. T. 43]. Thereafter Mr. Baker saw appellant walking in front of the bank towards the corner where a crowd had gathered [R. T. 43]. Appellant was standing among the crowd when Mr. Baker approached Officer Crawford and stated "that there was another one that could possibly be implicated" [R. T. 43]. Mr. Baker then pointed out the appellant to Officer Crawford [R. T. 127]. Officer Crawford asked Mr. Baker to walk up to appellant and point to him again which Mr. Baker proceeded to do [R. T. 133].

Appellant was standing in the crowd that had gathered and was leaning over peering through the crowd with his hands in his pockets [R. T. 134]. Officer Crawford asked appellant to take his hands out of his pockets. Appellant was then asked to walk away from the crowd, which he did. Officer Crawford then asked appellant what he was doing in the bank. Appellant's reply was "What bank?" [R. T. 135]. Officer Crawford then asked appellant what he was doing in town, to which appellant said "nothing". At this point Officer Crawford began to pat down the appellant; first Officer Crawford patted appellant's back pockets and then his jacket pockets [R. T. 135]. At this time another officer walked over and stood behind appellant [R. T. 136]. As Officer Crawford bent down and was patting the outside of appellant's jacket pocket he observed a large bulge underneath appellant's pants just beneath the belt line. He patted the bulge and felt something hard [R. T.

136]. Officer Crawford then told the other officer "It's a gun", at which point the other officer grabbed appellant's arms [R. T. 136]. Officer Crawford then extracted a fully loaded .38 caliber revolver from inside appellant's pants. Prior to patting the bulge in appellant's pants, Officer Crawford's hands never entered appellant's pockets.

At approximately 1:30 P. M. on the date of the robbery Special Agent Richard Burris of the F. B. I. interviewed appellant [R. T. 184]. After advising appellant of his constitutional rights Agent Burris asked appellant if he had seen the girl who had been arrested at the bank. Appellant replied that he had. Agent Burris then asked appellant if he had ever seen the girl or known her before. Appellant stated that he had never seen the girl before in his life [R. T. 187]. During the trial it was proved that appellant was friendly with Renee Meyers' husband and brother-in-law and that appellant had known Renee Meyers prior to the bank robbery [R. T. 169].

A.

THERE WAS SUFFICIENT PROBABLE CAUSE
FOR APPELLANT'S INITIAL DETENTION AND
SUBSEQUENT ARREST.

1. A Detention For Questioning is Not An Arrest.
-

In the case at bar, the arresting officer was a local police

officer, therefore, to determine what constitutes a detention and an arrest, we must look to California law. United States v. Di Re, 332 U.S. 581 (1947); Johnson v. United States, 333 U.S. 10, 15 (1947).

Under California law an arrest, " . . . is taking a person into custody, in a case and in a manner authorized by law". California Penal Code, Section 834.

Appellant in the case at bar is in the same position as was the petitioner in Davis v. California, 341 F.2d 982, 986 (9th Cir. 1965), when he was twice pointed out by Mr. Baker and told by Officer Crawford to leave the crowd and to take his hands out of his pockets:

"He was temporarily restrained prior to that time, not for the purpose of taking him into custody, but to interrogate him. This was not an arrest." [under California law.] Id. at p. 986.

When Officer Crawford first approached appellant, it was not to arrest him but merely to ask him some general questions concerning his presence in the bank and connections, if any, with Renee Jackson.

2. The Initial Detention of Appellant Was Valid and Supported by Good Cause.

At the time that Officer Crawford first talked to appellant,

he had been told by Mr. Baker that "there was another one that could possibly be implicated". Mr. Baker then twice pointed to appellant. If Officer Crawford had failed at least to question appellant at this time he would not have been fully responding to the mandate of his duties. See Frye v. United States, 315 F.2d 493 (9th Cir. 1960).

That a brief detention period under these circumstances is valid is well settled law. This Circuit has recently held in Wilson v. Porter, 361 F.2d 412, 415 (9th Cir. 1966) that:

"We take it as settled that there is nothing ipso facto unconstitutional in the brief detention of citizens under circumstances not justifying an arrest, for purposes of limited inquiry in the course of routine police investigation."

" . . . due regard for the practical necessities of effective law enforcement requires that the validity of brief, informal detention be recognized whenever it appears from the totality of the circumstances that the detaining officers could have had reasonable grounds for their actions. A founded suspicion is all that is necessary, some basis from which the court can determine that the detention was not arbitrary or harassing."

Cf. United States v. Vita, 294 F.2d 524, 529
(2nd Cir. 1961).

Finally, this Court's most recent expression on the subject of a detention period substantiates the validity of Officer Crawford's actions. In Jesse James Gilbert v. United States, 366 F.2d 923 (9th Cir. 1966) this Court stated:

"Substantial considerations favor the recognition of a carefully limited right of brief police detention on less than probable cause to believe the person detained has committed a felony."

3. The Seizure of the Gun From Appellant
 and His Arrest Were Valid As a Sub-
 stantially Contemporaneous Arrest and
 Search.

It would appear that the first time that appellant was actually "taken into custody" was at the moment when Officer Crawford said to the officer standing behind appellant "it's a gun" [R. T. 136] and appellant's arms were grabbed from behind. The officer's action at that moment should be considered a "taking into custody" within the meaning of Section 834 of the California Penal Code. Thus, it would seem as though appellant was placed under arrest at the exact moment that the loaded .38 revolver was first found.

If this Court should find that the "arrest" of appellant and the seizure of the gun occurred at a substantially contemporaneous point in time there should be no difficulty in upholding the validity of the seizure. This Court has already held in Cipres v. United States, 343 F.2d 95, 98 (9th Cir. 1965), that:

" . . . a prior search may be valid as incident to a substantially contemporaneous arrest without a warrant if the arresting officers had probable cause for the arrest at the time of the search, and the circumstances suggested that immediate search was necessary to preserve material subject to seizure."

The Government would urge this Court to uphold a substantially contemporaneous search where the circumstances indicate that a search of a suspect is necessary for the safety of the inquiring officers. It is to be noted that Officer Crawford's pat search of appellant was only a precautionary weapon search, not a search for contraband.

Appellant cites Mosco v. United States, 301 F.2d 180, 187 (9th Cir. 1962) for the proposition that Federal law requires that an arrest precede a search. In fact, Mosco supports the proposition that a substantially contemporaneous search and arrest may be upheld. In Mosco officers went to Mosco's apartment to place him under arrest. Not finding Mosco in the apartment they proceeded to conduct a search. Thereafter, Mosco arrived and was placed under arrest. The officers, upon entering the apartment and conducting the search did not anticipate Mosco's return. In invalidating the search of Mosco's apartment this Court considered the California cases which hold that "when a person is available for immediate arrest at the place of the search, the fact that the search preceded the technical arrest is immaterial". Mosco v.

United States, supra, at p. 188. Judge Barnes then stated:

"But assuming this rule may properly be embraced by federal court with regard to the search of premises, it does not sanction a search made before the individual is available for arrest. As before stated, policy reasons which support the rule are not present in those circumstances." Id. at p. 188.

In the case at bar appellant was present and available for arrest at the time he was searched. The policy reasons Judge Barnes referred to, i. e. necessity and the safety of the arresting officers were present in this case. It is submitted that far from invalidating Officer Crawford's actions, Mosco v. United States, supra, is authority upholding his actions.

Finally, the Supreme Court has specifically refused to reach the question of whether the Constitution requires that an arrest precede a search. Ker v. California, 374 U.S. 23, 42, 43 (1963).

However, the exact moment of arrest and search should not be determinative of this appeal. The Government most respectfully urges this Court to judge the overall reasonableness of the officer's actions relative to appellant. If, under all of the circumstances heretofore stated, Officer Crawford acted reasonably in detaining and questioning appellant after he had been pointed out by Mr. Baker as a possible suspect then the exact moment of arrest

should not be dispositive. The standard to be applied in determining whether a search was valid is one of reasonableness. United States v. Rabinowitz, 339 U.S. 56 (1950).

B.

THE STATEMENTS MADE BY APPELLANT
TO LOCAL POLICE OFFICERS AND THE
F. B. I. WERE ADMISSIBLE.

Upon first confronting appellant Officer Crawford asked him what he was doing in the bank. Appellant replied "what bank" [R. T. 135]. Officer Crawford then asked appellant what he was doing in town. Appellant responded "nothing" [R. T. 135]. This form of preliminary questioning has recently been upheld by this Court in Cotton v. United States, No. 20, 986, decided January 23, 1967.

"He was confronted with a set of highly suspicious circumstances, and it was entirely proper for him to ask Cotton what he was doing there and for identification." [p. 7 of slip sheet opinion.]

Appellant attacks the admissibility of his statement made to the F. B. I. subsequent to his arrest at the Huntington Park Police Department. Since appellant received a proper constitutional admonition by Agent Burris prior to making the statement it should be admissible unless invalidated because of its being the

result of an illegal arrest. As heretofore argued, the Government contends that appellant's arrest was valid, therefore the statement was admissible.

C.

THE EVIDENCE WAS SUFFICIENT TO SUSTAIN
THE CONVICTION

On appeal from a judgment of conviction the Court of Appeals is required to draw all of the favorable permissible inferences to sustain the verdict. Glasser v. United States, 315 U.S. 60 (1942); Byrnes v. United States, 327 F.2d 825, 830 (9th Cir. 1964).

In a criminal case based upon circumstantial evidence the test to be applied in deciding whether the evidence is sufficient to sustain a judgment of conviction is whether reasonable minds could find that the evidence excludes every hypothesis but that of guilt.

Holland v. United States, 348 U.S. 121, 139-140
(1954);

Strangway v. United States, 312 F.2d 283, 285
(9th Cir. 1963), cert. denied, 373 U.S. 903.

However, in the case at bar there is a substantial amount of direct evidence upon which Judge Hill based his verdict. The following direct evidence was introduced against appellant:

1. Just prior to the robbery appellant was seen by Mr. Baker walking through the alley behind the bank [R. T. 39].
2. Appellant was inside the bank at the time of the

robbery ostensibly for the purpose of opening a new account [R. T. 86].

3. Appellant was observed writing false names on the new account cards in a nervous manner [R. T. 87].

4. During the time that appellant was filling out the new account cards he was seen turning around and looking to his left, in the direction of Renee Jackson [R. T. 88].

5. When Renee Jackson entered the bank she saw appellant and recognized him [R. T. 177, 178].

6. The demand note handed to teller Sue Beaulieu by Renee Jackson stated, "bieeeing watched" [Exhibit 1 in evidence].

7. When appellant was arrested he was found to be in possession of a fully loaded .38 caliber revolver [R. T. 136].

8. When questioned by the F. B. I. appellant stated that he had never seen Renee Jackson before in his life [R. T. 187].

When appellant entered the bank he could have had but one of two purposes; to assist Renee Jackson in robbing the bank if his help became necessary, or to open a new bank account. All of appellant's conduct while he was inside the bank indicates that he had no intention of opening a new account. On two separate new account cards appellant filled in false names. While filling in the cards appellant appeared nervous and continued looking in the direction of Renee Jackson. Prior to filling in the cards appellant asked to use the center desk, from where he could have had a clearer view of Renee Jackson.

In Nye & Nissen v. United States, 336 U. S. 613, 619 (1949),

the Supreme Court stated that in order to aid and abet another to commit a crime a defendant must associate himself with the criminal venture and that he must seek by his action to make it succeed.

This Court has recently held in Ramirez v. United States, 263 F.2d 33, 35 (9th Cir. 1966), that knowledge that a crime was to be committed and presence at the scene is insufficient evidence upon which to rest a judgment of conviction.

"We find in the record no action, by word or act, on the part of appellant to make the crime succeed except appellant's knowledge that a crime was to be committed, and that he was present at the scene."

However, it appears from the above-quoted language that if there had been any action, by word or act on the part of appellant to make the crime succeed the conviction could have been sustained. In the case at bar the record clearly indicates that there were actions taken by appellant to assure the successful completion of the robbery. Appellant entered the bank prior to Renee Jackson armed with a loaded .38 caliber pistol. During the robbery appellant kept Renee Jackson under surveillance.

The mere fact that Renee Jackson did not need appellant's help while she was inside the bank does not negate the fact that appellant was present inside the bank with a loaded pistol to ensure a successful robbery.

The Second Circuit Court of Appeals has recently stated that this silent assistance toward the successful commission of a crime may be sufficient evidence upon which to base a conviction.

"It is true, . . . that evidence of an act of relatively slight moment may warrant a jury's finding participation in a crime

"Participation may be proved by circumstantial evidence

"There may even be instances where the mere presence of a defendant at the scene of a crime he knows is being committed will permit a jury to be convinced beyond a reasonable doubt that the defendant sought 'by his action to make it succeed' -- for example, the attendance of a 250 pound bruiser at a shakedown as a companion to the extortionist, or the maintenance at the scene of crime of someone useful as a lookout." (Emphasis added).

United States v. Garguilo, 310 F.2d 249, 253

(2nd Cir. 1962).

The Supreme Court has recognized that the presence of a defendant at the scene of a crime without any action by him may constitute aiding and abetting if there is evidence that the defendant had a purpose to aid but failed to act because such action was unnecessary. Furthermore, it must be shown that the presence of the defendant was pursuant to an understanding. Hicks v. United

States, 150 U.S. 442, 450 (1893).

In the case at bar there is evidence from which this Court can reasonably infer that there was an understanding or agreement between appellant and Renee Jackson to rob the bank. Renee Jackson testified that when she first entered the bank she saw appellant and recognized him. During the robbery appellant appeared nervous and looked toward Renee Jackson. The demand note presented to the teller stated "bieeeing watched". At the trial it was proved that appellant and Renee Jackson knew each other previously.

The case at bar is just such a case where the appellant had a purpose to aid the robbery but failed to do so only because any action on his part was unnecessary.

D.

GOVERNMENT'S EXHIBIT NO. 1 WAS PROPERLY ADMITTED INTO EVIDENCE.

Government's exhibit number one contains a declaration in furtherance of a common plan or conspiracy to rob the bank in question. Before this declaration could be admitted into evidence against appellant there must have been independent evidence that a common plan or conspiracy existed. Judge Hill admitted Government's exhibit number one into evidence subject to a motion to strike if the Government failed to establish this common plan or conspiracy by independent evidence. At the close of the Govern-

ment's case a motion to strike was made which motion was denied [R. T. 192]. Therefore, Judge Hill found that independent of the demand note itself there was sufficient evidence that a common plan existed.

Independent of the demand note the following evidence of a common plan or scheme existed:

1. When Renee Jackson entered the bank she saw and recognized appellant [R. T. 177, 178].
2. Appellant looked toward Renee Jackson while she was robbing the bank [R. T. 88].
3. Appellant knew Renee Jackson prior to the robbery.
4. Appellant carried a loaded .38 caliber pistol. The question of whether there was sufficient independent evidence of a common plan or conspiracy to admit the hearsay statement contained in the demand note against the appellant was a question for the trier of fact - Judge Hill - his ruling was based upon sufficient evidence.

E.

THE CROSS-EXAMINATION OF RENEE JACKSON WAS PROPER.

1. If a Witness Gives a Statement to Federal Agents and Then Attempts to Retract That Statement On the Witness Stand the Witness May Be Cross-Examined.
-

If a witness gives a statement to the F. B. I. and later

attempts to change that statement in a material way which will be detrimental to the Government cross-examination of that witness should be permitted. See Bushaw v. United States, 353 F.2d 477 (9th Cir. 1965).

In Weaver v. United States, 216 F.2d 23, 25 (9th Cir. 1954), a witness originally gave a statement to the F. B. I. Later the witness attempted to change his story in front of the grand jury. In sustaining the Government's claim of surprise and allowing the witness to be taken on cross-examination the Ninth Circuit held:

"The defense claimed there was no surprise because the witness had refused to testify in accordance with the previous story to government agents when she was before the Grand Jury. The Government, however, had a right to anticipate that, under oath, and in court, she would testify in accordance with her story to the Federal Bureau of Investigation."

Likewise, in the case at bar, the Government was justified in anticipating that, under oath and in court, Renee Jackson would testify in accordance with her original statement to the F. B. I.

Furthermore, the Government was under no obligation to produce any witness to establish that Renee Jackson had made prior contradictory statements since she admitted making the contradictory statements as may be seen from the following excerpt from her testimony:

"Q. BY MR. GLASSMAN: Mrs. Jackson,

you do know the defendant Ronnie Arnold, don't you?

"A. Not know him like you would know somebody, no.

"Q. Have you seen him prior to November 4, 1965?

"A. Not other than here, other than court.

"THE COURT: Just a minute.

Are you acquainted with this defendant Arnold?

"THE WITNESS: He knows my brother-in-law and my husband. Other than that, no.

"THE COURT: The question is, do you know him?

"THE WITNESS: No, not -- I haven't had anything to do with him. No. No.

"THE COURT: Had you ever met him prior to seeing him in the criminal prosecution in which you were involved and in which he is now involved?

"THE WITNESS: Oh, before then?

"THE COURT: Yes.

"THE WITNESS: Well, around the house, my mother-in-law's house, or the neighborhood.

"THE COURT: You seen him at your mother-in-law's house?

"THE WITNESS: He came to see Roland.

"THE COURT: Pardon?

"THE WITNESS: He came to see Roland.

"THE COURT: Who is that?

"THE WITNESS: My brother-in-law.

"THE COURT: Go ahead.

"Q. BY MR. GLASSMAN: Mrs. Jackson, after you were arrested, for the bank robbery in question, were you made aware of the fact that Ronnie Arnold had also been arrested: You saw someone arrest him, didn't you?

"A. Yes.

"MR. TARLOW: Object, your Honor. Compound question.

"THE COURT: That is a group of questions. One at a time.

"MR. GLASSMAN: Pardon me, your Honor.

"Q. Were you made aware of the fact that Ronnie Arnold was also arrested?

"A. Yes, sir.

"Q. After this time you gave a statement to Special Agent George Aiken of the FBI, didn't you?

"A. After this time?

"Q. After you were arrested did you not then give a statement?

"A. I talked to them. I didn't give a statement.

"Q. But you did speak to him?

"A. Yes.

"Q. And you told him certain things relative to this bank robbery, didn't you?

"A. I told him what I had done.

"Q. At this time you were advised of all of your constitutional rights, weren't you?

"A. Just what I had said could be used against me?

"Q. That's right.

"A. Yes.

"Q. And when you had this conversation with Agent Aiken, at this time you knew that Ronnie Arnold had also been arrested for this bank robbery, isn't that right?

"A. Yes, I did.

"Q. And at the time that you had this conversation with Agent Aiken did you not say to him, 'I had an accomplice'?

"A. At that time?

"Q. At that time, that you were interviewed by Agent Aiken, didn't you tell him that you had an accomplice in this bank robbery?

"A. Yes.

"Q. Did you tell him that someone else had helped you plan it the night before?

"A. Yes.

"Q. Did you also tell him that someone else was going to share the money with you?

"A. Yes.

"Q. Did you tell him that an individual had gone into the bank with a loaded gun to be your back-up man?

"A. An individual -- no. Because I told him no one was with me.

"Q. You never said that the plan was for you to go into the bank unarmed and that your accomplice was to go in with a gun and to protect you?

"A. Yes.

"Q. You did say that?

"A. Yes.

"THE COURT: I don't understand. Did you say that to the FBI agent?

"THE WITNESS: Yes. He asked me -- I told him exactly what I did. He asked me did I plan it. I told him I had planned it. He asked me how I planned it, and I told him.

"THE COURT: Did you tell him you had an accomplice?

"THE WITNESS: Yes.

"THE COURT: And did you tell him your accomplice was in the bank at the same time?

"THE WITNESS: I don't remember telling him that.

"Q. BY MR. GLASSMAN: But you did tell him somebody had been there with you who was to help you, is that correct?

"A. Yes.

"Q. And you told him you had planned it the night before and you were going to share the money?

"A. Yes.

"Q. Isn't it a fact that Ronnie Arnold was that man?

"A. No.

"Q. At the time you made this statement you have just told us you knew he was arrested, isn't that correct?

"A. I did.

"Q. And at the time you made this statement you implicated another individual, didn't you?

"A. I did. "

2. When The Government Is Under An Obligation To Call a Witness Because The Witness Has Knowledge Of a Crime, It May Impeach The Witness.

It was formerly the rule that a party could not impeach its own witness, on the theory that the party certified to the witness' honesty. However, both courts and commentators have repudiated the rule because it unduly restricts a court's fundamental objective -- to seek and find truth. Even assuming that there was ever any validity to the reason underlying the rule, the reason disappears when the government is forced to call persons who have knowledge of a crime. Obviously, as in the case at bar, such witnesses will after be friends, even accomplices of the defendant. The Ninth

Circuit has recognized this, holding that "the prosecution in a criminal case may impeach a witness whom it is under a legal duty or obligation to call, such as an available witness to the crime. . . . "

Weeks v. United States, 179 F.2d 319, 321

(9th Cir. 1950).

See also, Stevens v. United States, 256 F.2d 619, 622-623

(9th Cir. 1958),

Cf. , United States v. Freeman, 302 F.2d 347, 350

(2nd Cir. 1962), cert.den. 375 U.S. 958

(1963).

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of conviction of appellant Arnold should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Anthony Michael Glassman

ANTHONY MICHAEL GLASSMAN
Assistant U. S. Attorney

NO. 21387

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALETA G. COSTEN, et al.,

Appellants,

vs.

PAULINE'S SPORTSWEAR, INC.,
et al.,

Appellees.

APPELLEES' REPLY BRIEF

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Appellants,

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PAULINE'S SPORTSWEAR, INC. ,
et al. ,

Appellees.

APPELLEES' REPLY BRIEF

STATEMENT OF THE CASE

The five plaintiff-appellants initially filed a complaint on May 28, 1965 alleging, in substance, four counts of violations of the Sherman Act, Sections 1 and 2, and the Clayton Act, Section 3. Defendant Pauline's Sportswear, Inc. and its principal officers, Robert C. Abild and Desda S. Abild, having been served, filed three motions, to wit: to dismiss the action on grounds of venue, to dismiss the action because it fails to state a claim against these defendants, and to require plaintiffs to file a more definite statement [R. p. 29, ff]. The defendant, Regal Accessories of New York, was never served and did not appear in said action. In the

uncontroverted affidavit in support of the motions to dismiss [R. p. 31, ff.], it was established that defendant Pauline's Sportswear, Inc. was in the business of merchandising ladies' clothing (sports-wear) in sales volume of less than \$1 million per annum; and, that it was not engaged in interstate commerce during the times referred to in the complaint -- all of its franchises being in California -- and engaged in a business that has nationwide sales, of at least, in excess of \$100 million. (The \$100 million figure was obviously conservative, in that ladies' ready-to-wear business is approximately \$1 billion per year, or more than 10,000 times the sales volume of appellees.)

The general business of the corporation was the setting up of retail franchises within certain territorial limits, and supplying them exclusively with ladies' sportswear -- blouses, pants, capris, shorts, jamaica sets, etc. -- to sell for \$1, \$2 and \$3 at retail. Appellees bought merchandise from the named defendant, Regal Accessories, and others in the ordinary course of business.

All of the plaintiffs sought out the defendant Pauline's Sportswear and voluntarily signed the franchise agreement and sublease sued upon; and, they had closed their stores prior to the institution of the within litigation.

The motion to dismiss was granted [R. 93] with, among other things, the enunciation by the court that the commodities were in fair and open competition with other commodities of the same general class [R. 94; 2] and within the provisions of the California Business and Professions Code, Section 16902 (a).

The first amended complaint [R. 114, ff.] subsequently filed merely restated the second, third and fourth causes of action as to all of the plaintiffs in substantially the same form and substance as the original complaint (without regard to defendant's demand under Rule 12(e) for a more definite statement [R. 51; 14, ff.] which was filed concurrently with the original motion to dismiss). Again, a motion to dismiss was made upon the grounds that the complaint failed to state a cause of action, and was granted as to the amended complaint [R. 153]. At no time did plaintiffs cause to be filed any (counter) affidavits or additional basis for its complaint or amended complaint; nor, did they attempt to file a (third) amended complaint, which filing was not prohibited by the District Court decision. They have elected to stand on the first amended complaint.

ARGUMENT

I

DISMISSAL OF THE CLAIMS AT THE PLEADING STAGE WAS PROPER.

Appellants' first argument questions whether franchising arrangements should generally be considered exempt from the anti-trust laws; and, whether a complaint based on illegal franchising can be disposed of at the pleading stage.

It has been repeatedly held that franchising arrangements generally do not constitute a violation of anti-trust laws. It is the

exception when a franchise arrangement may constitute a violation. More important, however, the franchise is not a proper party to question the validity of a franchise arrangement.

A contract by which a manufacturing company, whose products are sold in interstate commerce, makes another sole agent for the sale of its products, is not in violation of this Section (15 U.S.C. 1, et seq.) as in restraint of interstate commerce, its effect on such commerce, if any, being indirect and incidental. Virtue v. Creamery Package Manufacturing Co., 227 U.S. 8, 57 L. Ed. 393 (Minn. 1913).

The mere fact that other dealers in the same product of the same manufacturer are eliminated does not make an exclusive dealership illegal, since it is the essential nature of the arrangement. The mere agreement between a manufacturer and a dealer to grant an exclusive dealership, i. e., the appointment of an exclusive selling agent, is not a violation of any rights (of third persons) under this Section. Baran v. Goodyear Tire and Rubber Co., 256 Fed. 571 (N.Y. 1919); Susser v. Carvel (D.C. N.Y. 1962), 206 F. Supp. 636.

There are innumerable cases supporting the proposition that exclusive dealership and exclusive territorial rights granted by a manufacturer or supplier to a retail outlet to the exclusion of competition, are nonviolative of the anti-trust sections, viz: a soft drink bottler refusing to sell its product (to plaintiff) in Brosious v. Pepsi Cola Co. (D.C. Penn. 1945), 59 F. Supp. 429, affirmed 155 F.2d 99. Broxham v. Bordens Farm Products of

Illinois (C. C. A. Ill. 1931), 53 F.2d 946 -- holding that the agreement not to engage in milk and ice cream business within the City of Chicago or 50 miles of the city limits for a period of five years was not an unreasonable extensive as to time or territory. To the same effect: United Lens Corp. v. Dory Lamp Co., 93 F.2d 969; and in Davidson v. Kansas City Star Co. (D. C. Mo. 1962), 202 F. Supp. 613 -- a contract whereby plaintiff purchased defendant's newspapers at wholesale for the purpose of selling them at retail and promising not to sell any other newspaper except plaintiff's, was not violative of the Sections.

It is established that the anti-trust laws were not intended to condemn any and all acts or practices which might have the effect of restricting competition; acts which only incidentally or indirectly restrict competition, where their principal purpose and effect is reasonable advancement of legitimate purposes, are not prohibited. John Wright and Assoc., Inc. v. Allrick (D. C. Minn. 1962), 203 F. Supp. 744.

These Sections are not intended to reach the normal and usual contracts or combinations which are incidental to lawful purposes, and are intended to further legitimate trade, nor are they intended to inhibit intelligent conducting of business operations. Roofire Alarm Co. v. Royal Indemnity Co. (D. C. Tenn. 1962), 202 F. Supp. 166. Only such contracts and combinations as by reason of intent or inherent nature of contemplated acts prejudice public interest by unduly restricting competition or unduly obstructing the course of trade are prohibited by Sections 1 to 7 and 12 to

27 of Title 15. Said Sections were intended to preserve competition, not to prevent injury to an individual. Admiral Theater Corp. v. Paramount Films (D. C. Neb. 1956), 140 F. Supp. 636. The court said in United States v. U. S. Steel Corp. (1924), 251 U.S. 417, 40 S. Ct. 293, that the Section is not directed against a mere expectation of monopoly but against its realization. Franchises have been developed to meet the distinct needs of manufactured products. . . . The dealer must make a considerable investment with uncertain results; the contracts are entered into in good faith by both parties and utilized by businessmen, and must be given a construction in accordance with the intent of the parties. (To the same effect: Imperial Refining v. Kanotex Refining Co., 29 F.2d 193 [8th Cir. 1928].)

Again, in United States v. Swift & Co. (1943), 52 F. Supp. 476, the court held that the mere fact that parties to an agreement thereby eliminate competition among themselves is insufficient to condemn as a violation of Sections 1 to 7 of this Title, if they must still seek competition in a fair market and neither seek nor are able to effect domination of prices. It is clear in the instant case that appellants do not (and cannot) allege a domination of prices by appellees, or the lack of a competitive, free, fair market.

It is axiomatic that in order to recover damages under the anti-trust sections, the effect on interstate commerce must be direct and not remote and must be the result of intent to restrain interstate commerce. There must be substantial and actual restraint of interstate commerce, and any conspiracy which only

indirectly or incidentally affects and restrains interstate commerce is not within the purview of the Sections. Sears Roebuck Co. v. Blade (D. C. Cal. 1953), 110 F. Supp. 96, dismissed 245 F.2d 67.

It seems so obviously clear that in anti-trust matters not only must a defendant be engaged in interstate commerce, but the actions of the defendant must have a direct restraint on interstate commerce resulting in a genuine injury to the public. It is apparent that there is no more competitive industry in the country than ladies' clothing or ladies' sportswear. To single out these two virtually unknown dealers in ladies' clothing or ladies' sportswear -- one a general supplier and the other a franchise distributor -- is patently not within the purview of the anti-trust statutes, regardless of what proof could be presented at the trial, and requires a dismissal at the pleading stage.

Appellants cite the case of Hathaway Motors v. General Motors Corp., 18 F.R.D. 283, as analogous to the instant case, and declare that the only difference from the instant case is that the damages alleged were that plaintiffs had been forced out of business because they were not able to compete with the franchise dealers (appellants' brief, pp. 6-7). It is submitted that the factual situation alleged in Hathaway is far different from the instant case, as will be shown.

In Hathaway, the complaint was brought by former independent unfranchised (emphasis added) automobile dealers (the number was not designated) for treble damages against defendants General Motors, Ford Motor Company, the Chrysler group, and certain

"authorized" or franchised dealers (emphasis added), and others, and included finance companies such as G. M. A. C. It is important to note that in Hathaway the parties who were in the same position as appellants herein, were named defendants as being party to the exclusive dealing allegedly eliminating plaintiffs from competition, etc. None of those plaintiffs were present or former franchise dealers of any defendants.

The plaintiffs in Hathaway alleged in essence the following: (1) the rigid maintenance of a system of exclusive dealer franchises arbitrarily limited in numbers and location, which operated to exclude from the business of selling current model automobiles, those independents who would not submit and conform to the system; (2) that the system was maintained by careful policing, designed to restrain franchise dealers from selling to the independents; (3) that the system was supported by various pressures from banks, finance companies, newspapers and even legislatures; (4) that the system fosters and forces the tie-in sales of accessories and service at excessive prices; (5) that the public was deprived of free competitive pricing by control over retail prices, by the control of the manufacturers in new and used car sales; and, (6) that the plaintiffs therein were injured by not being able to compete with the franchise dealers.

The court then observed that, if the allegations were true, it might be, as a matter of fact, a situation where a would-be distributor is denied access to a source of supply because of the exclusive dealing contracts with others (not the plaintiffs) (emphasis

added).

This basic distinction in the instant case and Hathaway has eluded the appellants, but forecloses their right to complain of being damaged by "exclusive dealing arrangements". The crux of the Hathaway decision appears to be the court's holding that plaintiffs had at least alleged a sufficient complaint to prove "conscious parallelism" of the business activities of the various defendants.

Furthermore, the mere fact that parties to an agreement thereby eliminate competition among themselves is insufficient to condemn an agreement as violating Sections 1 to 7 of Title 15, if they must still seek competition in a fair market and neither seek nor are able to effect domination of prices. United States v. Swift Co., supra.

In any event, to make any comparison between the automobile industry and General Motors on the one hand, and the ladies' sportswear industry and Pauline's Sportswear, Inc. (even with the other defendants) on the other hand, is so patently unreasonable and untenable as not to have any bearing on the instant litigation. The differences in the industries and the competitive factors in the automobile industry (and General Motors' relationship to that industry) may give rise to a cause of action for an outsider who wants to purchase General Motors' products. The trial court in this matter obviously recognized the distinction between automobiles and General Motors (or perhaps oil and Standard Oil) on the one hand and ladies' clothing and the defendants on the other. The bald allegation that defendants are engaged in interstate commerce,

when controverted by an affidavit, and not further supported by appellants in any manner -- combined with obvious facts of which a court may take judicial notice (such as the presence of large and substantial manufacturers and retailers in women's clothing, e. g., department stores, specialty shops, etc., and the multitude of manufacturers) -- demonstrates that the appellants cannot prove a claim under the Federal anti-trust statutes.

The gravamen of an anti-trust action is the direct effect on interstate commerce, competition and public interests that the restraint has. Anti-trust cases, depend on the particular factual situation alleged. The necessity of pleading further than appellants elected to do in this case, has been enunciated in anti-trust cases. In the case of Feddersen Motors v. Ward (10th Cir. 1950), 180 F.2d 519, it was held:

" . . . and in a case (of this sort) seeking treble damages by individuals, it is essential that the complaint allege violations of the act in the form of undue restriction or obstruction of interstate commerce and damage to the plaintiffs (from those acts) proximately caused by the acts and conducts constituting the violation. But injury alone is not enough upon which to predicate the action. There must be harm to the general public in the form of undue restriction of interstate commerce, . . . and a general allegation of the forming of a conspiracy or combination with resulting injury to the

public is not enough. Details are not necessary, but the complaint must allege facts from which it can be determined as a matter of law that by reason of the intent, tendency or inherent nature of the contemplated acts, the conspiracy was reasonably calculated to prejudice the public interest by unduly restricting the free flow of interstate commerce." (emphasis added).

Further, the court held in Black and Yates v. Mahagony Assoc. (3rd Cir.), 129 F.2d 227, that it is not enough to merely complain of an alleged violation in the words of the statute, but facts must be shown establishing the misconduct.

In the instant case, no facts are alleged showing a restraint on interstate commerce, a public injury, a conspiracy or an unlawful combination. In fact, it is obvious that competition in this field is at a peak and could hardly be more intense. The sum total of the allegations of the complaint herein simply fail to allege any facts upon which relief could be granted. Appellants have alleged the purported illegal agreement and sublease and "fear" of appellants if they violated said agreements and nothing more, other than conclusions, e. g., "the purpose (of which) was to lessen competition, create a monopoly, and harm the plaintiffs". The allegations simply fail to meet the test of the authorities cited.

Appellants cite the case of Nagler v. Admiral Corp., 248 F.2d 319, as supportive of its position. This case, however, was a complaint by 13 retailers against 26 defendants in the New York

area, comprised of 24 suppliers and two retail chain stores. The essence of the plaintiffs' complaint therein was that the two retail chain stores received special pricing concessions from the other defendants, in which the 13 plaintiffs did not participate. This type of allegation does go to the heart of anti-trust matters, but is in no way similar to appellants' complaints. Appellants do not have or claim to have the same standing as plaintiffs in Nagler, and do not have the standing as a matter of law, under the anti-trust statutes, to complain as an injured party for damages allegedly due to their own exclusive dealings with appellees.

Appellants admit by their allegations that they entered into the contractual agreements with defendant Pauline's Sportswear, and would obviously be proper defendants -- if all other necessary elements to an anti-trust action were present -- to a claim by a third party that they could not buy or deal in appellee's merchandise. It is firmly established that licensees, who enter into license arrangements with price-fixing provisions with knowledge of the principal contract, are equally subject to prohibitions of Sections 1 to 7 (United States v. General Instruments Corp. (D. C. N. J. 1949), 87 F. Supp. 157). It is, of course, clear that an anti-trust action is an action in tort at law (not in equity). (Northwestern Oil Co. v. Sacony Vacuum Oil Co., 138 F.2d 967, cert. denied, 321 U. S. 792; Weeks v. Baraco Oil Co., 125 F.2d 84; Williamson v. Columbia Gas and Electric Corp., 110 F.2d 15.) In the case of United States v. General Electric Co. (D. C. N. Y. 1949), 82 F. Supp. 753, the court held that licensees are equally

guilty with the licensor when there is a violation of the anti-trust statutes. It is apparent, therefore, that appellants would be in pari delicto with defendants if all of the elements of an anti-trust violation were present.

Appellants cite the case of Girardi v. Gates Rubber Co., 325 F.2d 196 as contrary to this proposition. This case, however, did not deal with a franchise arrangement as in the instant case, but was a completely different factual situation, wherein a supplier simply refused to deal with plaintiff retailer.

The plaintiff Girardi complained that as a one-time distributor of certain products of one defendant, he was cancelled because he failed and refused to adhere and submit to the required maintained price set by the supplier with other distributors (also defendants). Moreover, the defendant supplier and manufacturer refused to sell Girardi any of his products, and Girardi alleged a conspiracy between the defendant manufacturer-supplier and other retail distributors to maintain the prices at a higher level than Girardi was willing and able to sell at. The court held that the fact that Girardi had adhered to the prices for some time prior to his cancellation did not bar him from now suing for damages incurred by reason of his cancellation of a distributorship and the refusal by the manufacturer-supplier to sell him any products. The Girardi court merely restated the law that concerted refusals by traders to deal with other traders, who refuse to submit to the required price maintenance -- where the public interest is involved, or interference with the natural flow of interstate commerce is directly affected

and there is a monopolistic tendency -- is forbidden. A "per se" violation of price fixing was applied in that case. In the instant case, the California Business and Professions Code, Section 16902(a), part of the fair trade act, makes legal, contracts fixing the resale prices of commodities in open competition. Certainly, women's clothing is in open competition. At any rate, the price fixing alleged in the instant case is not the price fixing that is condemned by the anti-trust laws, since appellants nowhere claimed damage because of not being able to sell below the prices suggested in the franchise agreement. It is obvious that the Girardi price fixing would injure the public because of Girardi's ability to sell at less than the suggested prices. In the instant case the only injury alleged is the plaintiffs' inability to make a profit at the suggested prices. Further, it is not alleged that appellees herein threatened or cancelled appellants, or threatened or refused to deal with appellants, individually or in concert with any other person or corporations; nor is it sufficiently alleged how the public interest is involved or injured, or interstate commerce affected or a monopolistic tendency created. Appellants' standing or allegations are simply not those countenanced or protected by the anti-trust laws.

A third principal case cited by appellants, P. H. Machinery Co. v. Harnischfeger Corp., 207 F. Supp. 392, is again remarkably not in point. The allegations of plaintiff's complaint, set forth at length therein, alleged the following facts:

Defendant manufactured construction, mining, logging, and

industrial equipment and parts to the mining, logging and industrial equipment industries, in substantial quantities. Defendant entered into a written non-exclusive dealership with the plaintiff for the sale and service of defendant's equipment -- including electric shovels. There was also alleged a representation by the defendant that plaintiff would get the parts manufactured by the defendant for the electric shovel, so that plaintiff could sell and replace the parts and service the equipment. It was further alleged that defendant refused to sell or transfer said parts to the plaintiff. It was also alleged that defendant continuously dealt with a competing distributor (Mesaba Service and Supply Co.) exclusively, for the purpose of eliminating competition and restraining trade and to acquire a monopoly, all proximately resulting in Mesaba being the sole supplier of electric shovel parts, and the sole supplier of electric shovel parts, and the sole agency to service replacement parts of defendant's electric shovels; and further alleging the public was injured by being denied the benefits of free competition between parts suppliers for electric shovels, including the elimination of plaintiff as a distributor of said parts.

Upon the recitation of such allegations in the complaint, the court then held that there was a genuine factual issue, in that more than an exclusive dealing had been alleged.

Nowhere in the instant case is it alleged (or as a factual matter could it be proved) that there was any refusal by defendants or even a threat of refusal to deal with plaintiffs. Nor are there other factual allegations as set forth in the Harnischfeger case.

Nor is the factual situation in any way analogous to the instant case.

In Harnischfeger, the causes of action are based on the claim of a third party or retailer who is injured by reason of the exclusive dealing between other retailers and distributors, manufacturers or suppliers allegedly conspiring to eliminate the third party retailer (plaintiffs therein) from competing with the named defendant retailer, or being able to handle the supplier's (defendant's) products.

It was obvious to the District Court that appellants herein have misconceived their standing under the statutes. By the taking of enunciations of general principals of law under the anti-trust statutes from the various cases, with which appellees have no quarrel, appellants do not bring themselves within the factual situations or similar factual situations to which these principals of law apply. They are the joint tortfeasor and nowhere do they allege any breach of the agreement or "refusal to deal" by the appellees. They have simply not stated a cause of action and could not.

Parenthetically, it is noted that even in the cases involving gasoline stations and tied-in products (discussed infra), there are no allegations, or complaints, based on the restriction, requiring the plaintiffs therein to sell only the defendant's gasoline. The complaints went to the necessity of selling only the tires, batteries and accessories supplied by or sponsored by the defendant gasoline company; nor, is any case cited by appellants wherein the plaintiffs complained of not being able to sell the competitor's gasoline, when they were the dealer for the defendant gasoline company. It is

patent that Standard Oil dealers sell only Standard Oil gasoline, Texaco dealers sell only Texaco gasoline, etc., and these are not violations of anti-trust statutes.

II

THERE WAS NO ILLEGAL TIE-IN BY THE USE OF SUBLEASES.

The various causes of action raised in appellants' second contention (p. 11, appellants' brief), being Counts 3, 6, 9 and 12 of the original complaint and 2, 5, 8 and 11 of the amended complaint, simply failed to allege sufficient factual basis as a matter of law to constitute an illegal tie-in prohibited by the anti-trust laws.

Neither the complaint nor the amended complaint sets forth facts sufficient to show an unlawful "tying arrangement", and fails to allege acts of any defendants as required in actions for treble damages (Feddersen Motors case and Black and Yates case, cited supra); but merely refers to alleged fear of plaintiffs of possible action by defendants without any factual basis. Appellants have cited no cases wherein the tying product is a lease, much less a sublease (since appellees did not own any of the real property involved). It must be noted that the other elements of an anti-trust action, e. g., restrictions on competition in interstate commerce and a detriment to the public interest are not alleged factually but only as a conclusion in the complaint and amended complaint.

Appellants cite Osborn v. Sinclair Refining Co., 324 F.2d 566, presumably to sustain its position of a lease as an illegal tie-in. In that case, the plaintiff claimed treble damages because, as a service station dealer, his dealership was cancelled by the defendants (not the lease). More in point, the tying product was gasoline and the "tied-in" products were tires, batteries, and accessories (TBA), whereby the competitors for TBA were unlawfully closed off from competition. It was found that defendant had sufficient economic power in the distribution and sale of gasoline to appreciably restrain competition in TBA, and a "not insubstantial amount of interstate commerce was affected". The plaintiff Osborn had his dealership cancelled because of his actual refusal to comply with defendant's demands concerning the tied products, TBA, and thereafter defendant acted affirmatively by cancelling his dealership. No specific issue was raised in said case as to the lease. The court in this Osborn case held that a prior appeal had already determined that Sinclair had an unlawful arrangement with its other dealers and plaintiff's refusal to abide by it caused defendant to cancel the plaintiffs (emphasis added). The only issue in this Osborn case cited by appellants was damages. In the instant case there is no allegation or facts pleaded to indicate a refusal by defendants to deal with plaintiffs, or even allegations of any threats (e. g. cancellation) or other facts upon which to base an action. It is perhaps unnecessary to cite the case of United States v. Colgate Co., 250 U. S. 300, which might have allowed defendants to refuse to deal with the appellants herein. Appellants restrict their pleadings

to reference to the provisions of the franchise agreement and sub-lease and their "fear" of breaching the agreements. There are no allegations of defendants' alleged "economic power" or any amount of interstate commerce affected. The allegation to the effect that defendants' competitors were restricted from dealing with appellants [T. 136, lines 15-19] is insufficient.

It is interesting to note that in the dissent in the Osborn case, Justice Haynsworth, while not disagreeing with the law of the majority opinion, noted that nothing in the anti-trust laws prevented the owners of real property from insisting that it be devoted to the lawful purposes of the owner, and further noted that defendants Sinclair had a right to cancel the lease, although the cancellation of the lease was not discussed in the majority opinion.

Appellees have not contended, nor need they, that a single trader is exempt from the application of the anti-trust laws. Appellants, however, are reaching beyond the scope of protection afforded under the anti-trust laws by the claim that 50 subleases, without any further details concerning location, area, space, desirability, uniqueness, etc., are a "tying product". They simply do not approach the minimum requirements of a "tying product", nor can 50 subleases be compared to the distribution of gasoline of a major oil company, e. g., Sinclair Oil (which had tied in with Goodyear tires, batteries and accessories to the exclusion of Goodyear competitors).

It must be shown on the face of the complaint that defendants had sufficient economic power, in connection with the alleged 50

subleases, to substantially affect interstate commerce, and thereby appreciably restrain competition in ladies' sportswear. An allegation to this effect was not made and obviously could not be claimed when consideration is given to all of the real estate available for retail store purposes in the State of California or the affected areas. It is obvious that 50 subleases in the State of California simply do not qualify as a tying product within the concept and limits of the anti-trust statutes.

Appellants next rely on Northern Pacific Railroad Co. v. United States, 356 U. S. 1, and quote on page 15 of its brief some of the law of that case, enunciating a basic principal with which appellees need not quarrel, to wit, that defendants must have "sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product, and a not insubstantial amount of interstate commerce is affected".

The absence of any allegation by appellants herein of the economic power of defendants with respect to subleases (the tying product) causes the complaint to fail at that point. Moreover, the complaint does not allege any facts except the bald conclusion that there is an appreciably restraint to free competition and a substantial amount of interstate commerce is affected. By refusing to amend, it must be assumed that appellants have no factual basis upon which to make such allegations. Indeed, considering all of the commercial real property available for leasing and subleasing in California and the multitude of owners of said property, and the

various competitors in retail selling of ladies' clothing, all of which the District Court obviously took judicial notice as provided by law, no causes of action could be alleged.

It should be noted that in the Northern Pacific Railroad case, the unlawful activity was "preferential routing" by the defendant railroad. The factual situation therein is so distinct from the instant case that analysis is unnecessary. The court did, however, note by way of example an illustration which, it is submitted, is analogous to the instant case, to wit: "If twelve food stores in a community were to refuse to sell flour unless the buyer also bought sugar, it would hardly tend to restrain competition in sugar if its competitors were ready and able to sell flour (alone) by themselves." In the instant case, there was (and could be) no claim from a factual basis that competitors of appellants or appellees were not fully able to sell ladies' sportswear without a leasing arrangement.

Finally, appellants rely on Lessig v. Tidewater Oil Co., 327 F.2d 459, which case was reversed because of error in jury instructions regarding damages, and was again a case of tying product being gasoline and the tied product being tires, batteries and accessories, sold or sponsored by Tidewater Oil Co. The court enunciated the principal that the defendant Tidewater Oil Co. had to have sufficient economic power over the tying product (gasoline) to impose an appreciable restraint on free competition (in interstate commerce) and the tied product, and held that the power may be inferred from the tying product's desirability to consumers or from the uniqueness of it. In Lessig, plaintiffs

alleged the following facts: (1) That defendant conspired to control resale prices of the dealers and steadily increased wholesalers prices though the retail prices dropped several times; (2) Defendants threatened to terminate and did terminate (emphasis added) dealerships that did not comply with the retail suggested prices; and (3) Plaintiff was given a three-day notice of a lease termination after he refused to comply with defendant's resale prices in the district. It was further alleged by the plaintiffs that the dealers had to sell the tied products, TBA, sold or sponsored by defendant in order to obtain the gasoline and oil products of defendant, and would receive such products only if the dealers would not do business with competitors in TBA. Defendants inspected the dealer stations and threatened non-renewal of the dealership if the competitor's items were not returned. The dealers were on one year leases, and defendant had 2,700 service stations in eight western states, and sold 310 million gallons of gasoline and \$4 million to \$5 million of TBA.

The court held that this was sufficient pleading to base a factual finding as to whether or not all of the defendant's activity "substantially lessened competition or tended to create a monopoly in a line of interstate commerce". The court enunciated the acknowledged principal that the amount of "economic power" over the tying product (here, allegedly the subleases), prerequisite to a violation, is "sufficient economic power to appreciably restrain free competition on the tied product" (here, women's sportswear). This power may be inferred from the tying product's desirability

(emphasis added) to consumers, or from the uniqueness. It is apparent that there is virtually no consumer desirability or uniqueness in 50 subleases and the analogy thereof to gasoline as a tying product is torturing the intent of the law beyond its limits.

III

AS A MATTER OF LAW, THERE IS NO CLAIM UNDER CLAYTON ACT III.

Appellants cite the case of Standard Oil of California v. United States, 337 U. S. 293, but have failed to plead facts which would bring it within the standards and requirements set by said case.

That court did not overrule the law of United States v. Winslow, 227 U. S. 202, 33 S. Ct. 253, and United States v. U. S. Steel, cited supra, which held that exclusive dealing arrangements, normal, usual and customary business practices, as in the case of manufacturer or distributor acquiring control of the outlets preventing the outlets from buying other products, and where the manufacturer could not sell to other outlets, are lawful and are not illegal. The Standard Oil case did not reverse or lessen the effect of this pronouncement. The court held that where \$68 million of Standard Oil business (before 1948) was involved, an unreasonable restraint on interstate commerce was created. And an exclusive dealing arrangement therein might have the effect of substantially lessening competition and foreclosing a substantial share of the line of

commerce affected. Then a violation might occur if there had been a public injury.

In the instant case, there are no factual allegations upon which a claim of monopoly is based, and appellants do not have the standing to claim an injury by an alleged monopoly of which they would necessarily be a part. Again, the naked comparison of the Standard Oil Company with defendants and the oil industry to women's sportswear, without further specific acts pleaded, in the light of the obvious competition from various department stores, five and dime stores and other retail outlets, was patently considered by the District Court. Less than \$1 million of total sales by appellees in the ladies' sportswear business is not comparable to \$68 million of sales of Standard Oil Company in a given area (prior to 1948). Appellants did not allege (and certainly could not prove) unreasonable or arbitrary restrictions on competitors of appellees, and it is obvious that defendant's entire operation does not substantially lessen competition or tend to create a monopoly or foreclose a substantial share in a line of interstate commerce.

In such cases as Cane v. Chrysler (D. C. Del.), 80 F. Supp. 360, the court upheld exclusive dealership arrangements, noting that "the dealers are not misled or imposed upon but accept as nonetheless advantageous an agreement, . . . which in fact may be onesided. . . . Franchises have been developed to meet the distribution needs of manufactured products. The dealer must make a considerable investment with uncertain results and the contracts are entered into in good faith by both parties and utilized

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by businessmen and must be given a construction in accordance with the intention of the parties. Each party suffers a detriment and hopefully and advantage."

Even in such an industry as steel, the court held in the United States v. Columbia Steel Co., 334 U.S. 495, 68 S. Ct. 1107,

"The legality of contractual agreements for exclusive dealing has been sustained by the Supreme Court.

Exclusive dealings brought about by vertical integrations, or otherwise, are not illegal, at any rate until the effect of such control is to unreasonably restrict the opportunities of competitors to market products." (emphasis added).

The court noted that the dealer could cancel his contract and was under no duty to execute the contract in the first place. In the instant case it is clear that there is a fair market in ladies' sportswear and that the combination of appellants and appellees is virtually no factor in interstate commerce or in California commerce, bringing the appellees well within the limits of the many cases such as United States v. Swift and others heretofore cited.

There is no allegation herein that appellees intended to or were able to dominate prices or peg them artificially high against appellants' wishes. If the prices were pegged artificially low, it might be competitors of appellants who could complain, not the appellants themselves.

Where the outlet is restrained and prevented from buying

other's products (even automobiles), and other manufacturers cannot sell to the defendants' dealers, it was held (United States v. Winslow, cited supra) that such restraints were not frowned upon by the law but are common and inherent in the acquisition by a manufacturing company of outlets, regardless of whether the manufacturer creates the outlets or acquires an exclusive agency arrangement, and their legality has long been recognized. The control over branches and goods sold to branches -- even branches that are controlled by an exclusive arrangement with a distributor or manufacturer -- is not violative of the anti-trust laws, unless there is a substantial lessening of competition or the creation of a monopoly in a line of commerce. Donovan v. Pennsylvania Co., 199 U. S. 279, 26 S. Ct. 91. Also F. T. C. v. Curtiss Publishing Co., 260 U.S. 568. Even in cases involving Standard Oil such as United States v. Griffith, 334 U.S. 100, 68 S. Ct. 941, it has been held that there must be harm to the public and this is gauged by the effect of the practice on the free flow of goods in interstate commerce and the maintenance of competition in the field. There is no factual basis pleaded in the instant complaint indicating or claiming any alleged interference with the free flow of goods in interstate commerce or the maintenance of competition in the field of ladies' sportswear; nor, are there facts pleaded therein from which such an inference could be drawn.

Even in cases of the automobile industry, where there are (at the time of the decisions) less than a half dozen major manufacturers and suppliers, exclusive dealing has been upheld. Ford v.

Boone (C. C. A. 9th Cir.), 244 Fed. 335; Webster Motor Car Co.
v. Packard Motor Car Co., 135 F. Supp. 4, reversed on other
grounds, 243 F.2d 418.

IV

APPELLANTS HAVE NOT STATED A CLAIM OF A FACTUAL TRIABLE ISSUE UNDER THE SHERMAN ACT, SECTION II.

Appellees, having thoroughly discussed the pertinent cases, including Lessig v. Tidewater Oil Co., in preceding sections of this brief, will not restate or belabor the points made. Attention must again be drawn, however, to the defect in appellants' complaint of failing to allege any facts other than the wording of the statute, which is clearly insufficient. Moreover, a court can take judicial notice of certain basic factors, not the least of which is the inability of two virtually unknown companies (Robert and Desda Abild being the sole owners of appellee Pauline's Sportswear, Inc.) to monopolize or meaningfully attempt to monopolize interstate commerce in ladies' sportswear. Appellees should not be put to the burden and expense of further defense of a charge of monopoly and conspiracy on the wording of the statute. The basic purpose of the anti-trust laws and the Sherman Act sections is to preclude a large buyer from securing an advantage over a small buyer. In the instant case appellants at first attempted to gain the advantages of being part of a large organization, and at no time were they victimized by any alleged monopoly of defendants, in violation of

anti-trust laws. If appellees, with their franchisees, had ever actually attained a monopoly by virtue of an unlawful conspiracy, would not the appellants be defendants in an anti-trust action based on the same alleged violations of the Sherman Act upon which they now seek to sue? These laws were enacted for the protection of competitors to those in a situation similar to appellants', and not for the purpose of appellants entering into an agreement fully voluntarily without any coercion whatsoever and then claiming that the very agreement that they signed gives them a cause of action against the appellees. There is not in this case, a situation where after the agreements were signed, appellees then attempted to foist or force some additional conditions, restrictions or restraints on appellants. Nor, did defendants refuse or threaten refusal to deal with them (as in some of the cases relied upon by appellants).

Appellees need not quarrel with any of the law cited by appellants, but in Lessig v. Tidewater it must be noted that the tied product, TBA, was brought in after the execution of the agreements between plaintiff and defendants, and were not part of the agreements originally signed by the complaining dealers. Again, the analogy between Tidewater Oil attempting to monopolize a portion of the market was based on factual allegations. Appellants' quotation from said case appearing on page 22 of appellants' brief was dictum to the decision in that case, which, as already pointed out, was reversed because of an error instructing the jury concerning damages. Indeed, nowhere have appellants cited any authoritative case supporting the adequacy of their pleadings or attempted causes

of action, but have relied throughout on dicta and general statements of the law. This is evidenced by the citation of the Alcoa and Times Picayune cases. Certainly, the intent to violate Section II may be implicit in monopolistic conduct as it applies to Alcoa or others of its stature; but, appellants failed to allege any facts of monopolistic conduct on the part of appellees other than the execution of the franchise agreement and sublease.

The Times Picayune case fails to support appellants' position. In that case, the United States challenged a unit advertising contract arrangement by defendant whereby the defendant required would-be advertisers in one of its two papers to advertise in both its papers (a morning and evening paper) and would not accept ads in one paper only. Again the naked charge that two defendants (in substance) combined and conspired to unreasonably monopolize or attempt to monopolize a part of trade or commerce among the several states in the distribution of ladies' sportswear is so patently inadequate a pleading as to demand the District Court to dismiss the causes of action, in light of the cases and the clear competition in said field. Even if this case were dealing with some esoteric or sophisticated product not generally known to the public, e. g. , an electronic part or machine (or of which the court could not take any judicial notice as to the product or the field of commerce), appellants would have had to allege more facts upon which to base their claim of monopoly, conspiracy, and other violations.

CONCLUSION

It, of course, was not necessary for the District Court to enunciate every ground upon which the dismissal was granted. If the causes of action have been plead insufficiently, so as not to state causes of action as required; or the parties plaintiff are not proper parties to sue under the statutes, the District Court decision must be affirmed. This is particularly true where appellants fail to attempt to plead further factual allegations when not foreclosed from doing so by the District Court.

Women's clothing or the women's sportswear industry is not comparable to gasoline, automobiles or automobile accessories, aluminum, steel or any industry where there are less than one-half dozen dominant manufacturers or suppliers -- nationwide or in a given area -- and where interstate commerce is obviously affected and public injury apparent by the very defendants designated and the allegations of facts in the complaints. Simple restrictions on dealing with competitors, franchising in general, and alleged personal injury to a franchisee are not sufficient allegations.

In anti-trust cases, as perhaps in no other field of law, the pleadings must on their face show facts sufficient to constitute a cause of action, and cannot be stated merely in legal conclusions in the words of the statute, e. g., "tend to create a monopoly", "unlawful tie-in", etc.

It is not by accident that the authoritative cases in anti-trust litigation involve the dominant companies in industries in

which there are a limited number of major companies. The District Court could not ignore the presence of Sears, Penney's, Newberry's, Woolworths, Thrifty Drug Stores, Broadway Hale Department Stores, May Co. and the host of other stores selling women's sportswear, and the multitude of companies or individuals manufacturing and supplying merchandise. To compare 50 subleases in the State of California to the sale of gasoline of a major oil company is patently absurd.

Indeed, appellants concede that it would be a most difficult case to try. It is submitted it is a needless case to try, certain to fail of proof on all counts. The District Court was fully informed of appellants' claimed position and appellants cited most of their authorities to that court. It is submitted the District Court recognized a burdensome, wasteful and nuisance claim, brought by improper parties, failing on all counts to state causes of action. Said court's decision should be affirmed and appellees awarded costs and attorney's fees.

Respectfully submitted,

THOMAS H. GREENWALD

By: THOMAS H. GREENWALD

Attorney for Appellees.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Thomas H. Greenwald
THOMAS H. GREENWALD

IN THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

ALETA G. COSTEN, et al.,
Appellants,
vs.
PAULINE'S SPORTSWEAR, INC.,
et al.,
Appellees.

No. 21387

APPELLANT'S OPENING BRIEF

FILED

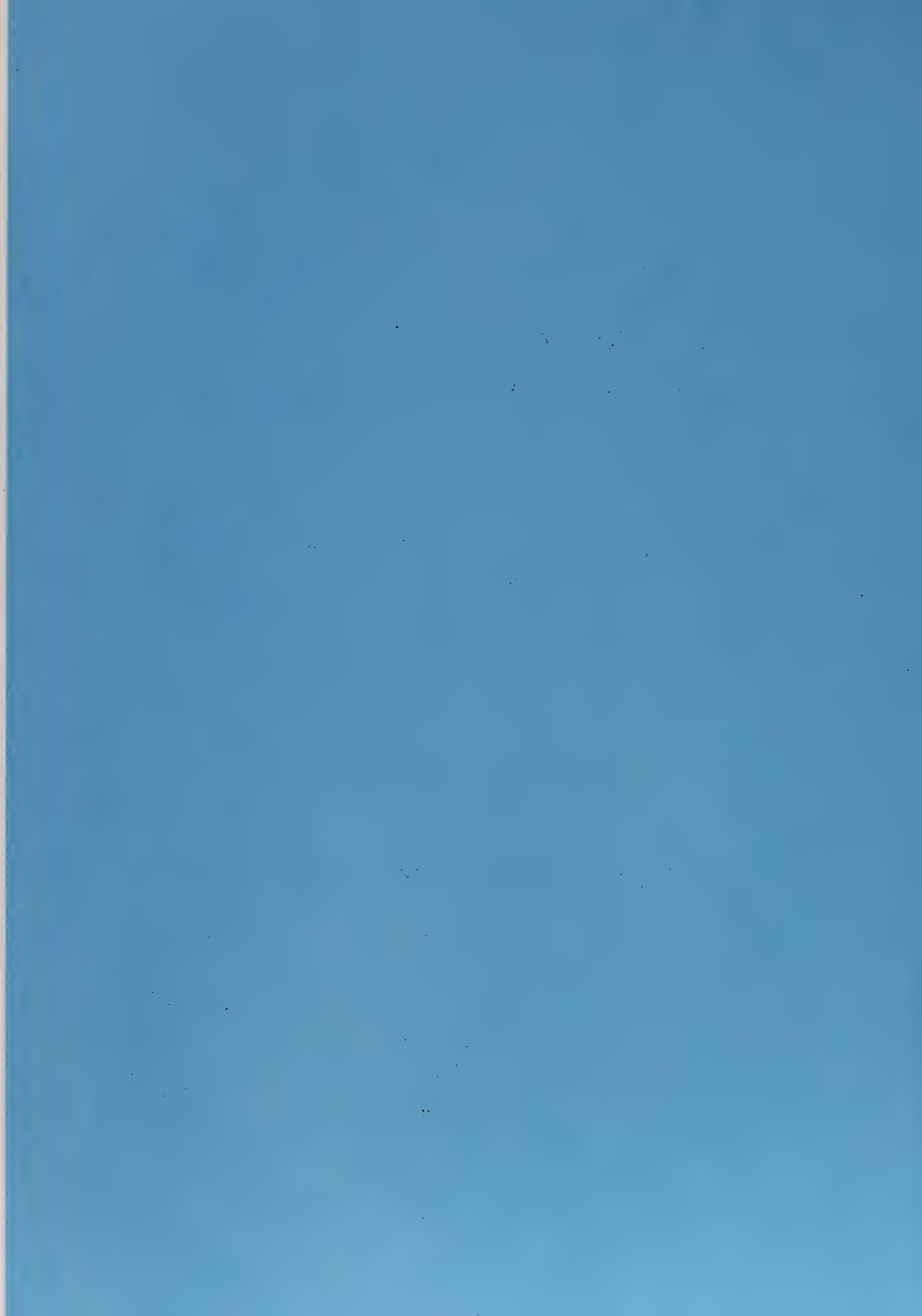
MAY 5 1967

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PAULINE'S SPORTSWEAR, INC.,)
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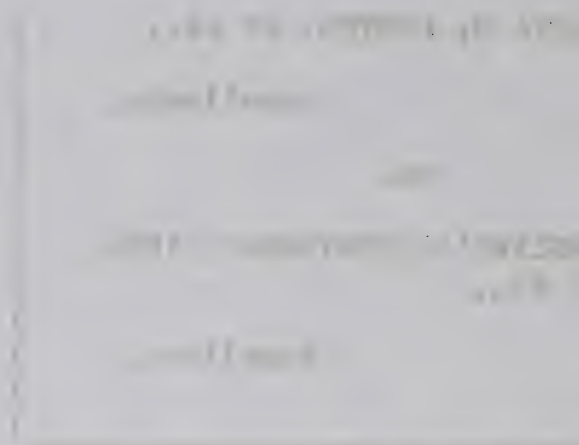
Appellees.)

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THE EFFECTS OF THE RAILROAD INDUSTRY

1880-1890



RAILROAD INDUSTRY

THE RAILROAD INDUSTRY
IN THE UNITED STATES
FROM 1880 TO 1890
BY
J. H. HARRIS

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General

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JURISDICTIONAL STATEMENT

Notice of appeal was filed with the District Court on April 27, 1966 [R. 154].* Appeal is taken from the Order of the District Court made and filed on April 5, 1966 [R. 153], and entered in the docket on April 6, 1966 [R. 163].

The United States Court of Appeals for the Ninth Circuit is vested with jurisdiction of this appeal from a final Order of the United States District Court for the Southern District of California, Northern Division, by Judicial Code §§ 1291 & 1294(1), 28 U.S.C. §§ 1291 & 1294(1).

* Citations to the Record on Appeal throughout Appellant's briefs are in the above form, which indicates the page in the (Clerk's) Transcript of Record. There is no reporter's transcript.

FOURTH JUDICIAL DISTRICT

Notice of appeal was filed with the District Court on April 17, 1906 [p. 100]. * Appeal is from the Order of the District Court made and filed on April 3, 1906 [p. 101], and entered in the books on April 6, 1906 [p. 102].

The Third Justice Court of Appeals for the State of California is hereby notified of this appeal from a final order of the United States District Court for the Southern District of California, assigned heretofore, by Justice of the Peace at Los Angeles, of March 27, 1906 [p. 103].

* Citation to the record on appeal through out appellant's briefs are to the above book, pages 100-103. The year in the (Clerk's) Transcript is 1906. There is no appellant's transcript.

SPECIFICATIONS OF ERROR

(1) The District Court erred by its order of April 5, 1966, dismissing the First Amended Complaint.

(2) The District Court erred by its order of January 14, 1966, dismissing the Complaint.

(3) The District Court erred by its order of November 24, 1965, granting defendants' motion to dismiss.

(4) The District Court erred by its order of November 24, 1965, in that its said order dismissed those claims stated under Sherman Act § 2, as amended, 15 U.S.C. § 2; Clayton Act §§ 3 and 4, 15 U.S.C. §§ 14 and 15 [Counts Two, Three, Five, Six, Eight, Nine, Eleven, and Twelve of the Complaint].

RECAPITULATION OF CASES

(1) The District Court acted by its order

of April 2, 1905, dissolving the first bonded com-

mission.

(2) The District Court acted by its order

of January 16, 1905, dissolving the Commission.

(3) The District Court acted by its order

of November 24, 1905, granting rehearings, motion to

dismiss.

(4) The District Court acted by its order

of November 24, 1905, in that the said order dissolved

the same as far as the same relates to the said motion.

2 U.S.C. § 2; Election Act § 2 and 3; 2 U.S.C. § 2

and 3; Election Two, Three, Four, Five, Six, Seven, Eight,

Nine, and Twelve in the Commission.

STATEMENT OF THE CASE

This appeal is taken by six persons, all plaintiffs below, from the District Court's order [R. 153] dismissing the first amended complaint. Appellees are Pauline's Sportswear, Inc., Robert C. Abild, and Desda S. Abild. One named defendant, Regal Accessories of New York, is not a party to this appeal. Appellants seek review of both the dismissal of the first amended complaint [R. 114, ff.] and the original complaint [R. 2, ff.]. The order dismissing the original complaint [R. 93-4], was clarified by the memorandum [R. 106] that stated findings were not required. Finally, a so-called "Judgment" [R. 111] was entered dismissing the complaint.

The first amended complaint [R. 114, ff.] was filed on February 10, 1966. On April 5, 1966 the District Court made its order [R. 153] dismissing the first amended complaint "for the reasons set forth in the dismissal of the original complaint." At this point, Appellants filed their notice of appeal and thereby abandoned any further opportunity to amend

their pleading.

Of course there is no Reporter's Transcript filed in this cause, as the only factual matter before this court consists solely of allegations in the original and the amended complaint. Plaintiffs charged violations of Sherman Act §§ 1 and 2, and Clayton Act § 3, and sought treble damages under Clayton Act § 4, as amended.

The original complaint was in twelve counts, in groups of three counts. Each group of three counts was based upon relations of the defendants with one particular franchise operation, there being four franchise operations involved in this action. There is no substantial difference in the allegations relative to one operation or another. Counts One, Four, Seven, and Ten charge resale price maintenance in violation of Sherman Act § 1. Counts Two, Five, Eight, and Eleven charge a monopolization violation of Sherman Act § 2. Counts Three, Six, Nine, and Twelve charge violation of Sherman Act § 1 [cited as "§ 2"] and Clayton Act § 3, through exclusive dealing and illegal

tie-ins.

The first amended complaint simply omitted the charged violations of Sherman Act § 1 as to each of the four franchise operations. Thus, the amended complaint did not rely on any claims of resale price maintenance, but included the charges of monopolization, exclusive dealing, and illegal tie-ins. The following factual statement is taken from the original complaint, Counts One, Two, and Three, on behalf of Appellant, Aleta G. Costen.

On June 20, 1964 Appellees made a franchise agreement with Mrs. Costen for a retail ladies' sportswear shop at the Bay Fair Shopping Center in San Leandro, California. The franchise agreement required her to purchase all merchandise requirements from Appellees, and the Appellees prohibited her merchandising at that location any ladies' sportswear produced or sold by anyone other than the Appellees. The premises were sub-leased to Mrs. Costen by Appellees.

As alleged in paragraph three of Count Three

[R. 7] of the original complaint:

"Said sub-lease and said franchise agreement were expressly conditioned upon restrictions that plaintiff COSTEN deal only in ladies' sportswear manufactured and supplied by defendants and plaintiff COSTEN was expressly prohibited from purchasing or selling merchandise manufactured or sold by anyone other than the defendants; such restrictions tied the tenancy under said sub-lease to an obligation to purchase women's sportswear for resale from the defendants."

It was further alleged, in paragraph seven [R. 8], that:

"That as a consequence of the aforesaid restrictions set forth in Paragraph Three of this cause of action, plaintiff COSTEN, because she feared that the defendants would forfeit her franchise and evict her otherwise, did not deal in the goods or merchandise of other manufacturers and distributors of ladies' sportswear than the defendants, and as a consequence thereof was unable to profitably operate a business of retail sales of clothing at the aforesaid location in the City of San Leandro, and plaintiff COSTEN was therefore damaged, as above alleged."

The complaint further alleges that (1) a purpose and effect of the combination was to unreasonably and arbitrarily monopolize or attempt to monopolize commerce in ladies' sportswear, (2) seventy-five such franchise and sub-lease agreements were made

"That said-leave and said restriction
agreement were expressly conditioned
upon receipt of the said \$100,000
and only in India, and that said
leave was granted by said leave and
restriction agreement was expressly conditioned
upon receipt of the said \$100,000
and that said leave was granted by said
leave and restriction agreement was
expressly conditioned upon receipt of
the said \$100,000, and that said
leave was granted by said leave and
restriction agreement was expressly
conditioned upon receipt of the said
\$100,000."

and further alleged, in paragraph seven (7), that:

"That as a consequence of the above-
said restriction and leave in paragraph
three of this case in which, plaintiff
states, he was not aware that the said
leave was granted by said leave and
restriction agreement was expressly
conditioned upon receipt of the said
\$100,000, and that said leave was
granted by said leave and restriction
agreement was expressly conditioned
upon receipt of the said \$100,000,
and that said leave was granted by
said leave and restriction agreement
was expressly conditioned upon receipt
of the said \$100,000, and that said
leave was granted by said leave and
restriction agreement was expressly
conditioned upon receipt of the said
\$100,000."

The complaint further alleges that (1) a

purpose and effect of the complaint was to restrain

and arbitrarily restrain or attempt to restrain

the exercise of India's, particularly, (2) conspiracy

with foreign and anti-Indian economic laws and

throughout California with the purpose and effect of controlling merchandising of ladies' sportswear, (3) the franchisees were prohibited from engaging in similar business in California, from merchandising other ladies' sportswear, and from merchandising similar goods produced by others, and (4) that Appellees "possessed monopoly power over the merchandise sold to plaintiff COSTEN, in that it bore the defendant's trade name 'Pauline's Sportswear.'" "

Throughout California with its progress and effort at
controlling manufacturing of liquor, however, it
the franchise were prohibited from working in what
for business in California, from maintaining their
other, however, was from maintaining their
only produced in 1917, and (b) the "Liquor" laws
which would have been the maintenance of the
Liquor Control, in 1917 it was the maintenance of
and under the liquor laws.

A R G U M E N T

I. DISMISSAL OF THE CLAIMS AT THE PLEADING STAGE WAS IMPROPER AS A MATTER OF PROCEDURE.

The Appellees' motions to dismiss the action for the asserted insufficiency of the complaint raises two significant questions: (1) whether franchising arrangements should generally be considered exempt from the antitrust laws, and (2) whether complaints based upon alleged illegal franchising arrangements can be disposed of at the pleading stage of the proceedings.

The motions were seemingly based upon Fed. R. Civ. P., Rule 12(b). Appellants have found a similar case, which was also presented on a motion to dismiss for failure to state a claim. This decision is Hathaway Motors v. General Motors Corporation, 18 F. R. D. 283 (D. Conn. 1955). This case was filed for treble damages under the antitrust laws against a group of franchisors, including General Motors Corporation. The District Court observed that the damages alleged were that plaintiffs had been forced out of

business because they were not able to compete with the franchise dealers. This fact of the Hathaway case is the only difference from the one now at bench. The pleading issue is identical, and as in the Hathaway case, the motion to dismiss should not have been granted.

The Court in Hathaway Motors held that circumstantial evidence could conceivably uphold the general allegations of the complaint, and therefore denied the motion to dismiss. The Court observed:

"In dealing with a motion to dismiss for failure to state a claim, the rule of Dioguardi v. Durning, 10 Cir. 1944, 139 F.2d 774, should be kept in mind. Such dismissal should not be granted unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim." 18 F.R.D. at 284.

The Hathaway decision was roundly approved by the late Judge Charles E. Clark, who in large measure drafted the Civil Rules. See Clark, "Special Pleading in the 'Big Case'," 21 F.R.D. 45, 52 (1957); and it was approved by the Court of Appeals in Nagler v.

Admiral Corporation, 248 F.2d 319, 325-6 (2d. Cir. 1957).

Another such similar case is P. H. Machinery v. Harnischfeger Corporation, 207 F.Supp. 392 (D Minn. 1962). In This case also the motion before the court was one to dismiss the complaint, and defendants additionally had moved for summary judgment. Plaintiff alleged that it had entered into dealer agreements with defendant for sale and service of certain equipment manufactured by defendant. In overruling the motions to dismiss and for summary judgment on the claim asserted under the Sherman Act and Clayton Act, the Court held as follows:

"It is undoubtedly true, as the cases cited by defendant indicate, that under certain circumstances an exclusive dealership agreement between a manufacturer and a dealer, similar to the one herein alleged, may not in and of itself constitute a violation of the anti-trust laws. However, the complaint not only alleges an exclusive dealership agreement between defendant and Mesaba, but goes on to allege that the purpose and result of such agreement has been to conspire to eliminate competition and restrain trade and to acquire a monopoly. A showing of such

circumstances surrounding an agreement of this type might well make out a case for violation of the Sherman Anti-Trust Act, and, consequently, it does not appear to a certainty that plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim." 207 F.Supp. 394-5.

One of Appellees' principal contentions has been that a dealer-franchisee has no standing to prosecute a treble damage action arising out of his relationship with his supplier-franchisor. This notion is neatly rebutted by the decision in Girardi v. Gates Rubber Co., 325 F.2d 196 (9th Cir. 1963). The Ninth Circuit there held that plaintiff was entitled to try his antitrust action, even though plaintiff Girardi had followed the suggested pricing from March, 1951, until early 1954. 325 F.2d at 197.

The exclusive dealing arrangements, alleged herein, are illegal, depending upon proof of relative strength of the parties, the proportionate volume of commerce involved, and the effects on competition in the market. Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 324 (1961). These questions simply can

circumstances surrounding the agreement
of this type might well make out a case
for violation of the Sherman Anti-Trust
Act, and, accordingly, it does not ap-
pear to a court that plaintiff would
be entitled to an injunction and other
relief which could be granted in equity
of the kind. 201 F. Supp. 296-7.

One of plaintiff's principal contentions has
been that a master-laborer has no standing to prop-
ose a triple damage action under the Anti-
Trust Act with its superior-organization. This action is

not precluded by the decision in United v. Hays
201 F. Supp. 296 (S.D. Cal. 1962). The same
court has held that plaintiff was entitled to its
triple damage action, even though plaintiff was
not a union but a labor organization. United v. Hays
201 F. Supp. 296 (S.D. Cal. 1962).

The decision in United v. Hays, 201 F. Supp. 296
is binding on the court in this case. The court in
United v. Hays held that plaintiff was entitled to its
triple damage action, even though plaintiff was
not a union but a labor organization. United v. Hays
201 F. Supp. 296 (S.D. Cal. 1962).

not be resolved at the pleading stage of this case. The territorial limitations may be illegal per se, depending again on the proof at trial. White Motor Co. v. United States, 372 U.S. 253 (1963), reversing a summary judgment.

not be removed at the present stage of the case.
The essential ingredients are the same as in
the case of the other cases, and the same
of the United States, 175 U.S. 100 (1900).

It is not necessary to

II. APPELLEES' FRANCHISES WERE ILLEGALLY TIED TO THE FRANCHISORS' POSSESSORY RIGHTS TO THE PARTICULAR LOCATIONS, BY USE OF SUB-LEASES.

One of the Appellees' contentions before the lower court was that as a single trader and franchisor it was somehow exempted from application of the antitrust laws. It is not apparent whether or not the District Court adopted this point of view. The contention is mistaken, however, as best stated in an opinion of Chief Judge Sobeloff, Osborn v. Sinclair Refining Company, 324 F.2d 566, 573 (4th Cir. 1963).

In the Osborn case the defendant required its gasoline dealers, as a condition for leasing service stations and purchasing gasoline from it, also to buy substantial quantities of tires, batteries, and accessories. Sinclair's principal defense was that its conduct in terminating the plaintiff was a simple unilateral refusal to deal, lawful under United States v. Colgate & Co., 250 U.S. 300 (1919). Chief Judge Sobeloff relied upon the decision in United States v. Parke, Davis & Co., 362 U.S. 29 (1960), in

dealing with this argument, stating:

"There the Court indicated that if a seller does no more than announce a policy designed to restrain trade, and declines to sell to those who fail to adhere to the policy, he has not put together a combination or arrangement violative of the antitrust laws. However, the Court emphasized that if the seller goes further, if he engages in actions extending beyond the bare announcement of his policy and the declination to sell "and he employs other means which effect adherence" to his policy, he has engaged in a combination or arrangement condemned by the antitrust laws. He can then no longer rely upon his "right" of customer rejection. There is no indication in Parke, Davis, or in any other case, that these principles regarding refusals to deal vary, depending upon whether there is a monopoly or concerted action with co-conspirators, or whether, on the other hand, there exists some other form of arrangement in restraint of trade. To the contrary, irrespective of monopoly or conspiracy, if the seller pressures his customers or dealers into adhering to resale price maintenance, or exclusive dealing or tie-ins, he has put together an unlawful arrangement and taken himself outside the narrow protection afforded by Colgate." 324 F.2d 573.

"Tying arrangements have been defined as agreements by a party to sell one product only on the condition that a buyer also purchase a different, or tied

product, from the seller, or that a buyer not purchase the tied product from any other supplier." Comment, 74 Yale L. J. 691 (1965). One of the most recent decisions involving tying arrangements is United States v. Loew's Incorporated, 371 U.S. 38 (1962), which was a challenge against block booking of motion pictures on television as violative of Sherman Act § 1. The Court there observed that "tying arrangements once found to exist in context of sufficient economic power, are illegal 'without elaborate inquiry as to . . . the business excuse for their use,' Northern Pacific R. Co. v. United States, 356 U.S. 1, 5." 371 U.S. 51-52.

Appellants, at this stage in the case at bench, do not contend that the sub-lease tie-in is or is not subject to application of a per se test such as that of International Salt Co. v. United States, 332 U.S. 392 (1947).

Rather, Appellants contend that the controlling test is that laid down in Northern Pacific Ry. v. United States, 356 U.S. 1 (1958), holding that tying arrangements,

"are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected."
356 U.S. at 6.

Appellants are not taking the same position as was taken by the plaintiffs in Susser v. Carvel Corp., 332 F.2d 505 (2d Cir. 1964), wherein plaintiffs stipulated that they were relying solely on per se violations of the antitrust law. There is another distinction from the Carvel case, namely, that the present appeal involves a true tie-in because the sub-leases bind the physical premises to the exclusive-dealing franchise agreement.

This aspect of the present case also brings it within the provisions of Clayton Act § 3, 15 U.S.C. § 14. Appellants recognize that proof of Clayton Act § 3 violation must include a showing that the arrangement substantially lessened the competition or tended to create a monopoly in a line of commerce. The District Court, however, did not allow Appellants to go to trial on this issue or any other issue.

"The information in this document is not to be distributed outside the agency and is to be controlled in accordance with the provisions of the Freedom of Information Act, 5 U.S.C. 552."

Appellate has not taken the same position

was taken by the plaintiff in United v. Egan

311 F.2d 802 (2d Cir. 1963), wherein plaintiff

alleged that they were being denied by the

officials of the defendant. There is no

action from the Egan case, namely, that the

plaintiff is not a true citizen because the

plaintiff is not a citizen of the United States.

being a citizen of the United States.

This aspect of the present case is

within the purview of 5 U.S.C. 552

is, Appellate requires that the

plaintiff must be a citizen of the United States.

and Appellate requires that the

plaintiff is a true citizen. The

plaintiff, however, did not allege

that he is not a citizen of the United States.

A recent decision of this court, Lessig v. Tidewater Oil Co., 327 F.2d 459 (9th Cir. 1964), a treble damage suit by a service station operator, explains the bases of the Sherman Act § 1 tie-in claim. In Lessig the court held that a tying arrangement was unlawful under Section 1:

- (1) when there is sufficient economic power to impose an appreciable restraint on free competition in the tied product;
- (2) that this power may be inferred from the tying product's desirability or uniqueness;
- (3) power to monopolize need not be demonstrated;
- (4) full scale inquiry into the scope of the relevant market and the seller's share is unnecessary; and
- (5) the requisite control of the tying product may be inferred from the seller's success in imposing a tying condition upon a substantial amount of commerce in the tied product.

327 F.2d at 469-470.

Certainly the allegations in both the original and the amended complaints in the present case embrace facts sufficient to support a finding of an

A recent decision of this court, Exxon v.

Mississippi, 357 U.S. 950 (1958), 2

while damage will be a serious matter.

claiming the basis of the decision is that

claim. In Exxon the court held that a claimant

was not entitled under Section 1

(1) where there is sufficient evidence to

show that an enterprise was engaged in

free competition in the market.

(2) that this power was not subject to the

claimant's responsibility to the

claimant.

(3) that in Exxon the court held that a claimant

was not

(4) that while Exxon was the basis of the

claimant's claim and the court's decision is

unquestioned, but

(5) the court's decision in Exxon is

not an authority for the claimant's

claimant in Exxon is a claimant in

the Exxon case.

357 U.S. at 950-951.

Consequently, the Exxon decision is not an authority

for the court's decision in the Exxon case.

which this court is asked to find in

illegal tie-in under these requirements of the Lessig case. The tied product is ladies' sportswear and the tying product is the leased space or franchise location.

III. APPELLANTS SHOULD HAVE THEIR DAY IN COURT
TO PROVE THEIR CLAIM UNDER CLAYTON ACT § 3.

The preceding argument attacking the tie-in aspects of the franchises touches upon Appellants' claims under Clayton Act § 3. Section 3, however, strikes particularly at exclusive dealing practices. It has been said that the test of Section 3 "is a somewhat friendlier test than that applied to tie-ins, since it requires proof of a substantial share of a relevant market" Kaysen & Turner, Antitrust Policy 147 (1959).

The leading case on exclusive dealing, applying Clayton Act § 3, is Standard Oil Co. of Calif. v. United States, 337 U.S. 293 (1949), holding that exclusive supply contracts with independent dealers were illegal. The Court there interpreted the qualifying language of Section 3, namely, "where the effect . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce." After examining and rejecting many suggested tests, the Court held, "the qualifying clause of § 3 is satisfied by

proof that competition has been foreclosed in a substantial share of the line of commerce affected."

337 U.S. at 314.

The original complaint in Count Three, paragraph 6 [R. 8], set up the factual claim in accord with the Standard Oil Co. criterion with these allegations:

"The purpose and effect of the aforesaid restrictions and sales were to substantially lessen competition or tended to create a monopoly in ladies' sportswear by unreasonably and arbitrarily restricting the opportunity of defendants' competitors to market their products."

The same allegations appear again in Count Two, paragraph 6 of the first amended complaint [R. 119].

The effect in the instant case is, of course, the same effect as obtained in Standard Oil Co., supra. When the franchisee or dealer observes his contract, he forecloses his franchisor's competitors from "whatever opportunity there might be to attract his patronage." 337 U.S. at 314. Or, as the Court also said, "use of the contracts creates just such a clog on

competition as it was the purpose of § 3 to remove

. . . . " Ibid.

A strikingly similar case, decided after Standard Oil Co., supra, is United States v. Richfield Oil Corp., 99 F.Supp. 280 (S.D. Cal. 1951), aff'd per curiam, 343 U.S. 665 (1952). The Richfield decision involved "leased-out" stations as well as dealer stations. The leased-out station arrangements were similar to the Pauline's Sportswear sub-lease franchises, in that the lease included a clause "merging into the instrument all other agreements." 99 F.Supp. at 287. The trial judge found, as a matter of fact, that the leases,

"and the oral agreements superimposed on them confine the operations of the stations to which they apply to dealing exclusively with Richfield petroleum products and automotive accessories handled or sponsored by Richfield." 99 F.Supp. at 297.

The judgment that the agreements were illegal and enjoined was affirmed per curiam on the authority of the Standard Oil Co. case, supra. 343 U.S. 665 (1952).

Finally, it is submitted that allegations of the instant complaint were well within the standards prescribed by this court in Lessig v. Tidewater Oil Co., 327 F.2d 459 (9th Cir. 1964), for a jury verdict based upon Clayton Act § 3. See 327 F.2d at 467-470. It is respectfully submitted that Appellants should be accorded the same opportunity as are other litigants to prove their claims under Clayton Act § 3.

Finally, it is submitted that appellants
are entitled to a new trial because the
evidence presented by this case is substantial
and material. See People v. [redacted],
100 Cal. 2d 454 (1963). The evidence
presented in this case is substantial
and material. It is respectfully submitted that appellants
should be accorded the same opportunity as was given
appellants in People v. [redacted] and People v. [redacted].

IV. APPELLANTS SHOULD HAVE THEIR DAY IN COURT TO
PROVE THEIR CLAIM UNDER SHERMAN ACT § 2.

Count Two of the original complaint [R. 5-7]

set up Mrs. Costen's claim under Sherman Act § 2,
alleging, in part:

"An additional purpose and an additional effect of the aforesaid combination or conspiracy was to unreasonably and arbitrarily monopolize or attempt to monopolize that part of the trade or commerce among the several states having to do with the sale and distribution of manufactured ladies' sportswear." [R. 5-6].

As was true of all but the Sherman Act § 1 allegations, the District Court in no way mentioned or discussed any reason for dismissing the complaint as to Counts Two, Five, Eight, and Eleven - the Sherman Act § 2 counts. See Order Granting Defendants' Motion to Dismiss filed on November 24, 1965 [R. 93-94]. Nor did the order [R. 153] disposing of the amended complaint state any reasons for the District Court's action.

We turn, then, to a somewhat similar case wherein the trial judge withdrew Section 2 charges from the jury, Lessig v. Tidewater Oil Co., 327 F.2d 459 (9th Cir. 1964), discussed supra. Lessig was a matter

... AVAILABLE SHOULD HAVE BEEN IN ORDER TO
BEAT THEIR CLAIM UNDER CHAPTER 11.

First Two of the original complaint (p. 3-5)

up here. Chapter's claim under Section 541

Section 541(c)(2)

"An individual who has an interest
in the property of the decedent is entitled to
receive the proceeds of the property in the
event of the decedent's death. The interest
in the property is the right to receive the
proceeds of the property in the event of the
decedent's death. The interest is the right
to receive the proceeds of the property in the
event of the decedent's death. The interest
is the right to receive the proceeds of the
property in the event of the decedent's death."

As was true of all the other cases

Section 541(c)(2) the interest claim is not denied

Section 541(c)(2) the interest claim is not denied

in United Trust Bank, Ltd. v. United Trust Bank, Ltd.

Section 541(c)(2) the interest claim is not denied

Section 541(c)(2) the interest claim is not denied

the order (p. 11) regarding the interest claim

the order (p. 11) regarding the interest claim

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the order (p. 11) regarding the interest claim

the order (p. 11) regarding the interest claim

where Tidewater's exclusive dealing and tie-in arrangements were attacked. In its decision reversing the trial judge, this court held as to Section 2, that:

"The essence of monopoly is power to control prices and exclude competition, and what we have said demonstrates that there was evidence that Tidewater possessed the specific intent to acquire and exercise such power with respect to a part of commerce.

* * * *

"We reject the premise that probability of actual monopolization is an essential element of proof of attempt to monopolize. Of course, such a probability may be relevant circumstantial evidence of intent, but the specific intent itself is the only evidence of dangerous probability the statute requires - perhaps on the not unreasonable assumption that the actor is better able than others to judge the practical possibility of achieving his illegal objective.

"When the charge is attempt (or conspiracy) to monopolize, rather than monopolization, the relevant market is 'not in issue.' United States v. E. I. Du Pont & Co., 351 U.S. 377, 395 n. 23 (1956)."

327 F.2d at 474.

See also Judge Learned Hand's opinion in the famed Alcoa case, U. S. v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945). Although the Alcoa facts are unique, one principle of that decision is important to the present case, namely, that the intent violative of Section 2 may be implicit in the monopolistic conduct.

Further, Section 2 reaches plans or programs to monopolize, even though there be no monopolistic result at the time the suit is filed or tried. Times-Picayune Pub. Co. v. U. S., 345 U.S. 594 (1953). Appellants submit they have a right to test their Section 2 allegation, whether it be to prove a monopolistic conspiracy or an attempt to create a monopoly.

CONCLUSION

Appellants began their argument from the premise that this action should not be determined at the pleading stage, although it would necessarily be a difficult, tedious case to try. In ensuing sections of this brief, Appellants have sought to demonstrate that their allegations do set forth claims upon which relief may be granted.

It is noted that only the allegations of the Costen counts have been examined in detail, but the claims of the other Appellants are nearly identical in substance. Appellants respectfully submit that all claims of the original complaint are entitled to a full hearing as to the legality of the purpose, design, and effect of Appellees' franchising practices. It is submitted that the District Court should be reversed and the cause remanded with directions that Appellees answer the original complaint.

Respectfully submitted,

FULLERTON, LANG & RICHERT

By William T. Richert

INTRODUCTION

Spelling-books began their appearance long ago, and since that time have been one of the most important factors in the training of the child. It is not surprising, therefore, that the spelling-book should have been one of the most widely used and most successful of all school books. The purpose of this book is to present a new and improved spelling-book, one which will be found to be of great value to the teacher and to the child.

It is noted that many are dissatisfied with the spelling-books now in use, and that they are looking for a better one. The purpose of this book is to present a new and improved spelling-book, one which will be found to be of great value to the teacher and to the child. The book is divided into two parts, the first of which contains the words which are most commonly used in the English language, and the second of which contains the words which are less commonly used. The words are arranged in alphabetical order, and each word is given with its correct spelling and its meaning. The book is designed to be used as a reference book, and to be of great value to the teacher and to the child.

Respectfully submitted,
J. H. BROWN, JR.

ATTORNEY'S CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

William T. Richert

ATTORNEY'S OFFICE

I hereby certify that the
execution of this deed, I have executed from 15
and 20 of the United States Court of Appeals for
the District of Columbia, and that, in the execution of
this deed, I have executed from 15

15.

WITNESSES:

No. 21385

United States
Court of Appeals
for the Ninth Circuit

BERNARD HENRY OLIVER, JR.

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

*On Appeal from the Judgment of the United States
District Court for the District of Oregon*

BRIEF OF APPELLEE

SIDNEY I. LEZAK,
*United States Attorney
District of Oregon*

FILED

MAY 5 1967

WM. B. LUCK, CLERK

MAY 8 1967

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United States
Court of Appeals
for the Ninth Circuit

BERNARD HENRY OLIVER, JR.

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

*On Appeal from the Judgment of the United States
District Court for the District of Oregon*

BRIEF OF APPELLEE

COUNTER-STATEMENT OF THE CASE

On February 2, 1966, appellant came into the Citizens' Branch of the U.S. National Bank of Oregon at Portland, Oregon and handed a teller a blank deposit slip and a note which instructed the teller to put money in a paper bag which he handed her. (R. 8).¹

¹References to the two-volume trial transcript will be designated "R".

The teller attempted to look at him as she placed the money in the bag so that she could identify him although appellant told her several times to stop looking up. (R. 12).

He walked out of the bank in a normal manner there was nothing unusual about his speech or tone of voice, no odor of alcohol was detected on his breath and there was nothing unusual about his eyes. (R. 13).

To the teller he seemed "pretty calm like any depositor coming in to make a deposit." (R. 14)

The appellant gave a statement to the F.B.I. in which he acknowledged that he had a small pocket knife in his jacket pocket and that he had prepared a note before coming into the bank which stated,

"Put all your money in this bag, don't give an alarm until after I've left. I'm armed." (R. 33, 34).

When appellant took the witness stand he denied having made the statement that he had prepared the note before coming into the bank, but admitted that he knew that this was in the statement which was given to the F.B.I. and signed by him. (R. 95)

I.

THE COURT APPLIED THE CORRECT TEST OF INSANITY IN INSTRUCTING THE JURY

Appellant does not contend that the instructions given by the court as to the test to be applied in determining insanity were incorrect under the applicable precedents in this circuit or that the evidence was insufficient to justify a finding of sanity under the applicable law.

This court has refused other recent invitations to reverse convictions because of the use of these tests. In *Smith v. U.S.*, 342 F.2d 725, the court reiterated the position taken in *Sauer v. U.S.*, 241 F.2d 640 (9th Cir. 1957) that this court would leave any drastic change to higher judicial authority or to Congress.

Since the trial of this case, this court has stated in *Maxwell v. U.S.*, 368 F.2d 743 that it "express(es) no opinion as to the correctness of . . . the A.L.I. proposal or variations of that proposal, nor do we now indicate either approval or disapproval of the *Davis* instruction, followed in *Andersen* and *Sauer*."

Since this court's decision in *Maxwell* (supra) the Court of Appeals for the 8th Circuit has decided *Pope v. U.S.*, 372 F.2d 710. This case is particularly instructive because of its review of recent changes

in the decisional law and an approach which reflects a view consonant with the realities of the trial setting. That court takes the position that if the "elements of knowledge, will and choice are emphasized in the charge as essential and critical constituents of legal sanity, we shall usually regard the charge as legally sufficient." 372 F.2d 710, 736.

The court says that it expects that if the above elements are covered, a jury would reach the same conclusion no matter which of the various tests, except for the Durham rule, were used. The court holds that the instructions in that case, which used the same tests applied here, did cover the required areas and affirmed.

In view of the number of times that this court has recently considered the issue presented by this assignment and the plethora of materials before the court in the decisions cited appellee will refrain from further discussion of the law at this point.

There is nothing in this simple bank robbery case that compels a change of so drastic a nature in our test for insanity that reversal should be ordered. If the teachings of the *Pope* case were to be followed, the failure of the court to give instructions under the A.L.I. code if preferred by the court would be harmless error since the trial court here included all the elements required by that case.

II.

**THE INSTRUCTION OF THE COURT AS TO THE
QUANTUM OF EVIDENCE NECESSARY TO OVER-
COME THE PRESUMPTION OF SANITY WAS INVITED
BY APPELLANT AND IS NOT REVERSIBLE ERROR**

Not only was no exception taken by the appellant's counsel to this part of the court's instructions, but the very language used was taken from appellant's Requested Instruction No. 6-A submitted as an appendix to appellant's motion which has been forwarded by the Clerk of the District Court as a supplemental transcript.

In any event the court clearly instructed the jury that it was the government's burden to prove sanity beyond a reasonable doubt and the jury could not have been misled by this instruction.

III.

**IT WAS NOT ERROR FOR THE COURT TO EXCLUDE
TESTIMONY BY APPELLANT'S WIFE MRS. OLIVER AS
TO HIS CONDITION LONG AFTER THE CRIME**

In order to properly appreciate the inappropriateness of appellant's objection on this score, it should suffice to refer to the proceedings in court.

Mrs. Oliver was called by the defense as a witness and stated that she married appellant two

days after the robbery on February 4, 1966, having met him for the first time on February 3, 1966.

The balance of the direct examination pertinent to this assignment follows:

“Q You knew him for one day, and then you got married, is that it?

A Yes, sir.

Q When was the first time that you knew your husband had been involved in a bank robbery?

A About thirty days ago. I didn't know it until after he had already turned his self in. I read it in the paper.

Q Had you noticed anything about your husband's conduct, the way he acted prior—before he went down and turned himself in?

A Yes, I did. I gave it a lot of consideration too.

Q Would you tell the jury what you noticed, Mrs. Oliver?

THE COURT: How would that prove his condition at the time of the event?

MR. YORK: Well, my only feeling was, your Honor, it might show—it would have some indication what his mental situation was.

THE COURT: When?

MR. YORK: I realize it was well after the robbery, your Honor.

THE COURT: This was four months after the robbery. If there is any question about the alleged confession or admission, that would be relevant. But, I just don't know what relevancy it would have to proving that he was either sane or insane on February 2nd. Perhaps what his attitude or mental condition was on February 3rd might have some relevancy. But what his mental condition was in May and June, I can't see it.

MR. YORK: All right." (R. 71, 72).

Thereafter Mrs. Oliver was permitted to testify as to her husband's conduct and drinking habits during the period after the robbery. (R. 72, 73).

The government contends that the appellant got everything from the witness to which he was entitled and that no error was committed by the court in limiting the witness to a period which was relevant to the inquiry.

CONCLUSION

It is respectfully submitted that the assignments of error are without substantial merit and that the judgment and conviction of appellant should be affirmed.

Dated this 4th day of May, 1967.

SIDNEY I. LEZAK
United States Attorney
District of Oregon

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

Dated this 4th day of May, 1967.

SIDNEY I. LEZAK
United States Attorney

N O. 2 1 3 8 4 ✓

JUN 19 1968

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT M. SWAFFIELD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

FILED

JUN 11 1968

WM. B. LUCK, CLERK

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT M. SWAFFIELD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

STATEMENT OF PLEADINGS AND FACTS
DISCLOSING JURISDICTION

On January 19, 1966, the Federal Grand Jury for the Southern District of California, Central Division (now Central District of California) returned Indictment No. 35688 CD in four counts, charging appellant and his co-defendant, Stanley W. Stanick, as follows:

1. Count One charged a violation of Title 18, United States Code §371 (Conspiracy) and alleged inter alia that appellant and Stanick, together with one Grover G. Kreiger, Jr., an unindicted co-conspirator, and other individuals, conspired to

obstruct the lawful functions of the Securities and Exchange Commission and to commit violations of §§ 77q and 77x of Title 15, United States Code, by filing registration statements and amendments thereto, which contained material false statements about Universal Ecsco Corporation's financial condition and by causing Shinn Industries, Inc. securities to be sold to members of the public by means of false and misleading statements concerning the financial condition of Universal Ecsco Corporation, and its predecessor Ecsco (a partnership).

2. Counts Two, Three and Four charged violations of Title 15, United States Code §77x and alleged that appellant and Stanick knowingly and willfully caused false statements of material facts to be made in the registration statement and amendments thereto of Shinn Industries, Inc. which were filed with the Securities and Exchange Commission by appellant and Stanick. The false statements charged in Counts Two, Three and Four were the same and were as follows:

(a) That in the Statement of Income, the net loss of Ecsco (a partnership) for the year ended December 31, 1959, was stated as \$1,169.00, when in fact, as defendants well knew, it was in excess of \$125,000.00.

(b) That in the Statement of Financial Position, the contracts in process for the four months period ended August 31, 1960, were stated as \$544,610.00, when in fact, as defendants well knew, the contracts in process were less than \$175,000.00.

(c) That in the Statement of Income, the net

loss of Universal Ecsco Corporation for the period of four months ended August 31, 1960, was stated as \$26,994.00, when in fact the net loss, as defendants well knew, for this period exceeded \$395,000.00.

(d) That in the Statement of Financial Position, the retained earnings deficit of Universal Ecsco Corporation as of August 31, 1960, was stated as \$26,944.00, when in fact, as defendants well knew, the deficit exceeded \$395,000.00 [C. T. 2-15]. ^{1/}

Count Two charged that the false statements were made in Amendment No. 1 to the Registration Statement of Shinn Industries, Inc. filed with the SEC on or about February 15, 1961.

Count Three charged that the false statements were made in Amendment No. 2 to the Registration Statement of Shinn Industries, Inc. filed with the SEC on or about March 24, 1961.

Count Four charged that the false statements were made in the post-effective Amendment No. 1 to the Registration Statement of Shinn Industries, Inc. filed with the SEC on or about April 6, 1961.

On March 7, 1966, appellant was arraigned and entered a plea of not guilty to all the charges in the indictment [C. T. 17]. On June 8, 1966, appellant and Stanick waived trial by jury and right to request any special findings of fact as provided by Rule 23(c) of the Federal Rules of Criminal Procedure [C. T. 62]. The

^{1/} "C. T." refers to Clerk's Transcript.

court trial of appellant and Stanick commenced on June 27, 1966, before the Honorable Irving Hill, United States District Court Judge [C. T. 63].

At the close of the appellee's case on July 20, 1966, appellant and Stanick each made a motion for judgment of acquittal which motions were denied [C. T. 73]. At the conclusion of the trial on August 5, 1966, Judge Hill found appellant and Stanick guilty as charged on all counts [C. T. 83].

On August 15, 1966, appellant filed a motion for a new trial wherein he raised substantially the same issues that he now raises in his brief [C. T. 84 thru 100]. Appellee opposed said motion, and on August 26, 1966, after a hearing, Judge Hill denied the motion [C. T. 109].

Following the denial of appellant's motion for new trial, appellant and Stanick were each sentenced by Judge Hill to pay a fine of \$1,250.00 on each of the counts One, Two, Three, and Four of the Indictment for a total of \$5,000.00. The court further ordered that imposition of sentence was suspended as to imprisonment on each of counts One, Two, Three, and Four of the Indictment, and, appellant and Stanick were placed on probation on each of said counts for a period of three years [C. T. 110]. A timely notice of appeal was filed by appellant [C. T. 111].

On September 1, 1966, appellant filed an Application and Motion in Forma Pauperis requesting to be allowed to prosecute his appeal without prepayment of fees and costs [C. T. 112 thru 116]. On September 6, 1966, Judge Hill denied appellant's

request and certified under 28 U.S.C. Section 1915 that appellant's proposed appeal was not "taken in good faith and is frivolous. The grounds of the proposed appeal are the same grounds set forth in defendant's [appellant's] motion for a new trial which was considered and denied by the Court heretofore." [C. T. 117].

Thereafter appellant appealed to this Court and was permitted to prosecute his appeal in Forma Pauperis.

The United States District Court for the Southern District of California has jurisdiction of this case pursuant to Title 15 U.S.C. §§77x, 77q(a) and Title 18 U.S.C. §371. This court has jurisdiction to entertain this appeal pursuant to Title 28 U.S.C. §§1291 and 1294.

II

STATUTES INVOLVED

Title 18 U.S.C. §371, provides in pertinent part as follows:

"If two or more persons conspire either to commit an offense against the United States, or to defraud the United States, or any agency thereof, in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both."

Title 15 U.S.C. §77x, provides in pertinent part as follows:

"... any person who willfully, in a

registration statement filed under this subchapter, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than \$5,000 or imprisoned not more than five years, or both."

Title 15 U.S.C. §77q(a) provides in pertinent part as follows:

"It shall be unlawful for any person in the offer or sale of any securities . . . by the use of the mails, directly or indirectly --

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates . . . as a fraud or deceit upon the purchaser."

* * *

III

BRIEF OF APPELLANT

At the outset appellee desires to call the attention of this Court to appellant's brief which, in appellee's opinion, does not comply with Rule 18 of the Rules of the United States Court of Appeals for the Ninth Circuit for the following reasons:

1. Although appellant has a section labeled "Statement of Facts" numbering fifteen pages (pages 2 thru 16) in only one of the pages thereof (page 9) does he cite any reference to the Reporter's or Clerk's Transcript. Consequently, much of what appellant cites as having occurred at trial, or as part of the record does not appear to be part of the record and is in direct violation of Rule 10(2)(c) of this Court's rules which provide that the brief shall contain:

"A concise . . . statement of the case, presenting the questions involved and the manner in which they are raised with record references supporting each statement of fact or mention of trial proceedings." (Emphasis added)

2. This failure of Appellant to cite references to the transcript, pervades not only his "Statement of Facts", but also to a significant degree, that portion of his brief entitled "Argument" wherein, he purports to sustain his contentions of "Specifications of Error", pages 19 through 66 of Appellant's Brief.

3. Further, with regard to the specification of errors relied upon by appellant, Rule 18(2)(d) required that each alleged error shall "be numbered and set out separately" and when the

error is the admission or rejection of evidence the party shall quote the grounds of objection urged at trial and the substance of the evidence admitted or rejected. This rule was honored by appellant more in the breach thereof than the observance and this Court's attention is invited specifically to pages 56 and 57 wherein appellant therein cites merely the references to the transcript in approximately 31 separate instances without any reference whatsoever to the grounds urged at the time of trial, and the substance (even in part) of the evidence "admitted or rejected".

4. Rule 18(2)(c) of the Rules of this Circuit requires that:

"A concise argument of the case (preferably preceded by a summary) exhibiting a clear statement of the points of law or facts to be discussed with a reference to the pages of record and the authorities relied upon in support of each point." (Emphasis added).

As will be noted from an examination of Appellant's Brief, it is for the most part at the end of his brief (pages 57 thru 66 thereof) that he cites authorities which he states "applies to the evidence in this case which has been substantially set forth in our argument." Thereafter follows a pell-mell reference to some 42 different cases, each citing or allegedly supporting a general statement of law which appellee in principle for the most part does not dispute, but which is in no way specifically related, directly or indirectly to appellant's argument.

IV

STATEMENT OF THE CASE

A. QUESTIONS PRESENTED

Appellant, on pages 17 and 18 of his brief, lists four general specifications of error. The first two allege respectively that the judgment of the court is not supported by any substantial evidence and that said judgment is contrary to the weight of the evidence. The third specification of error alleges that the trial judge committed error in certain of his rulings concerning grand jury testimony, restricting cross-examination of Government witnesses and errors in ruling on objections adverse to defendant and in enforcement of the stipulation regarding "Jencks Act statements." The fourth specification of error is quite general and entitled "The judgment is contrary to law". We have winnowed these specifications to the following questions which appear to be the issues which appellant seeks this Court to review:

1. Was the evidence sufficient to convict appellant of each of the four counts?
 - a. Does the evidence support the court's finding that appellant, in concert with his co-defendant Stanley W. Stanick and others, conspired to obstruct the lawful functions of the Securities and Exchange Commission and to commit violations of §§77q and 77x of Title 15 U.S.C. by filing registration statements, and amendment thereto, which contained materially false statements

about Ecsco and Universal Ecsco Corporation's financial condition?

b. Does the evidence support the Court's finding that appellant knowingly and willfully caused false statements of material facts to be made in the amendments to the registration statement of Shinn Industries, Inc., which were filed with the Securities and Exchange Commission on February 15, 1961, March 24, 1961, and April 6, 1961?

2. Did the Court commit prejudicial error in its rulings regarding production of Jencks Act statements, the grand jury testimony of Grover S. Krieger, in "restricting cross-examination by the appellant of government witnesses" or in its ruling regarding appellant's objections?

B. STATEMENT OF FACTS

1. INTRODUCTION

The thrust of this case revolves around a registration statement and amendments thereto of Shinn Industries, Inc. which were filed with the SEC^{2/} on November 29, 1960, February 16, 1961, March 27, 1961, and April 6, 1961, Exhibits 1A, 1B, 1C, and 1D, respectively [R. T. 37]. ^{3/} The purpose of the registration

^{2/} The registration statement was required to be filed pursuant to Section 5 of the Securities Act of 1933, 15 U. S. C. 77e.

^{3/} R. T. refers to Reporter's Transcript.

statements was to register 150,000 shares of Shinn Industries, Inc. common stock which was offered to the public at a total price of \$900,000. In addition, there was registered inter alia, the following:

- (a) \$900,000 principal amount of 6% ten-year convertible subordinated debentures; and
- (b) 112,500 shares of common stock initially issuable upon full conversion of the subordinated debentures; and
- (c) \$200,000 principal amount of 6% five-year convertible debentures. Exhibit 1E (page 1). [R. T. 37].

Shinn Industries, Inc. was in reality a holding company of Shinn Engineering, Inc. and Universal Ecsco Corporation Exhibit E (page 6). The false statements which form the basis for the indictment related to the understatement of losses and overstatement of inventory, denominated contracts in process, of Universal Ecsco Corporation and its predecessor partnership Ecsco. Said false statements are set forth in the registration statement and the various prospectuses, contained in the registration statement, under the heading of "Statement of Financial Position - Universal Ecsco Corporation" and "Statement of Income and Retained-Earnings Deficit", pages 44, 45, and 46 of Exhibit E [R. T. 37]. Copies of these pages are set forth herein as Appendix A. The printed figures reflected therein are the amounts which were stated in the registration statements. The penciled notations therein reflect the true and correct amounts which should have been stated therein and which were proven at trial.

2. THE BUSINESS OF ECSCO

In 1958, appellant and his co-defendant Stanick organized a partnership (wherein they were the sole partners) to engage in business as an engineering consulting firm. The partnership did business under the name of Ecsco and in early 1959 submitted bids to the U. S. Post Office Department for furnishing and installing a mechanized mail-flow system which received the incoming mail and sorted, stored and conveyed the mail within the post office, thus partially automating the traditional post office operations. Exhibit 1E (page 11) and Exhibit 5 (page 1). [R. T. 37]. In June, 1959, Ecsco was awarded two fixed price contracts with the U. S. Post Office. Exhibit 5 (pp. 1 and 7) [R. T. 35]. One of the contracts was for a post office in Kansas City, Missouri, on which Ecsco bid \$494,204; the other contract was for a post office in Philadelphia, on which Ecsco bid \$1,931,040, Exhibits 3A and 3B [R. T. 44].

Work commenced on the Kansas City job which was substantially completed and in operating condition by December, 1959, Exhibit 5 (p. 9) [R. T. 35]. Control Design & Fabricators, Inc ("Condeco"), a sub-contractor on the Kansas City job, was responsible for the controls portion of the Kansas City job, Exhibit 5 (p. 8). Work commenced on the Philadelphia job in the latter part of 1959, Exhibit 5 (p. 9), and the Philadelphia job was completed by the fall of 1961 [R. T. 1345]. Condeco was a joint venturer on the Philadelphia job and it was agreed that Condeco would receive \$710,167.00 for its portion of the work on that job,

Exhibits 5 (p. 8), and 3B [R. T. 44].

On June 20, 1960, the Post Office Department awarded Ecsco (which had on April 30, 1960 incorporated as Universal Ecsco Corporation) three additional fixed price contracts for the installation of mechanized mail handling systems for post offices in New Orleans, Louisiana (\$993,785), Houston, Texas (\$2,510,579), and Portland, Oregon (\$2,621,161), Exhibit 5 (p. 9).

Throughout the period of time that Ecsco was engaged in these post office contracts, it suffered from a chronic shortage of capital and was unable to fund its operations from internal sources [R. T. 1181, 1495, 1496, 1962, 1965, 2004], Exhibits 21A through ZZ and 22 [R. T. 2026]. The primary source of funds for operation was in the form of progress payments from the Post Office Department.

3. THE KANSAS CITY JOB

The Kansas City job (Ecsco's first major contract) [R. T. 1490], constituted practically all of Ecsco's business activities in 1959, Exhibits 8A, 8B, 10B, 11B [R. T. 370, 378, 387, 2380]. The contract provided that Ecsco would supply and install a mail-flow system in the Kansas City, Missouri, post office for the fixed sum of \$494,200. Subsequent change orders increased the contract price to \$509,676, Exhibit 3A [R. T. 44]. Ecsco in turn sub-contracted a major portion of this job to Condecó. The contract entered into between Ecsco and Condecó is dated July 29, 1959,

and stipulates that the sub-contractor (Condeco) "will provide all materials, labor, supervision, administration, tools, equipment, transportation, handling, storage, services, supplies, protection and all other items of expense for the performance and completion of the contract" and "do all the necessary electrical and their installation and construction to place a completely integrated conveyor system in operation" for a fixed base price of \$202,907, Exhibit 17A [R. T. 1174]. Condeco performed its work as a sub-contractor on the Kansas City job [R. T. 1175] and in accordance with the terms of the July 29, 1959, Kansas City contract, Condeco billed Ecsco the full contract price, Exhibits 14D, 14E, 14F, 14G [R. T. 1176]. There being no question concerning the propriety of these billings, the invoices were recorded on Ecsco's books at approximately the time they were received [R. T. 502-506].

In October and November, 1959, Alfred D. Benson, President and owner of Condeco [R. T. 1164, 1165], repeatedly questioned appellant and Stanick concerning payment for the work that Condeco had performed on the Kansas City job [R. T. 1178, 1179]. Appellant and Stanick attempted to avoid speaking with Benson about the matter and referred Benson to Grover S. Kreiger, Jr., the "comptroller" of Ecsco [R. T. 1170]. In response to the question why Benson questioned Kreiger, Benson replied:

"A Well, any time I would call, or call either in person or over the phone to try to find out when we were going to be paid, if I talked to either Stanick or Swaffield, they would always refer me to

Kreiger, saying he was the one that handled the money, and I had to see him because he knew all the details about when I was to be paid." [R. T. 1179].

Although Condecos work on the Kansas City contract had been completed by November, 1959, only \$50,000 had been paid on account by Ecsco [R. T. 1177, 1178]. By early December 1959, Benson threatened to take immediate legal action if Ecsco did not pay the \$160,000 owed, Benson stated he would put Ecsco out of business [R. T. 1181].

Ecsco was in a financial crisis and Stanick, the co-defendant, was recalled from the Caribbean where he was vacationing to help solve the matter [R. T. 1346]. Being unable to pay the monies demanded by Condecos and after extended discussion, Ecsco (by its partners, appellant and Stanick) and Condecos (through its President, Benson) entered into an agreement dated December 16, 1959, Exhibit 17B [R. T. 1962] whereby Ecsco acknowledged its indebtedness to Condecos for the sum of \$164,513.20, as the balance due on the Kansas City contract and agreed to pay Condecos \$30,000 forthwith; Ecsco agreed that the balance due to Condecos (\$134,513.20) be added to Condecos's portion (\$710,167.00) of the payments to be made by the United States Government on the Philadelphia contract. The agreement also provided that in the event Condecos received less than the sum of \$844,680.20 (\$710,167.00 plus \$134,513.20) from the Government, Ecsco would remain liable to Condecos for the amount not paid by the Government [R. T. 1183, 1184].

Although this agreement, Exhibit 17B, did not alter the fact that these costs for Condecos work were incurred on the Kansas City job, in contemplation of public financing, and in order to show a more favorable financial picture, Appellant and Stanick, through Kreiger, ordered Harold Kavert, an accountant employed by Ecsco, to reverse approximately \$129,435 ^{4/} of costs on the books which had previously been charged to the Kansas City job and to reduce the amount of accounts payable Condecos accordingly, Exhibit 14H [R. T. 511-518].

4. APPELLANT'S SEARCH FOR PUBLIC FINANCING

During late 1959 and early 1960 appellant and Stanick in an effort to obtain money to fund Ecsco sought public financing. They approached several underwriters in the New York area. Eventually they were referred to Myron A. Lomasney & Company [R. T. 1493, 1494].

At a meeting in New York with the Lomasney representatives during early 1960, appellant and Stanick presented them with

^{4/} Computed as follows:

Balance owing to Condecos on Kansas City contract	\$ 134,513.20
--	---------------

Less: Interest and discount not previously recorded on Condecos books	<u>5,077.43</u>
---	-----------------

	\$ 129,435.77
--	---------------

financial statements (uncertified) of Ecsco for the year 1959, Exhibit 13A [R. T. 130].

This statement indicated, and appellant and Stanick represented, that Ecsco had a \$191 loss in 1958 and a \$37,282 profit in 1959. Appellant and Stanick conveniently neglected to mention their recent financial crisis with Condeco, their inability to respond to Ecsco's debts and the recent reversal of \$129,435 on their books. Appellant and Swaffield projected sales of \$4,875,000 and \$1,200,000 respectively, Exhibit 13A [R. T. 126-130]. Additionally, Appellant and Stanick submitted a statement indicating a profit of \$11,102 for the two months ended February 29, 1960, Exhibit 13B [R. T. 225]. Appellant represented to the Lomasney group that the Kansas City job was completed in 1959, and that the Philadelphia job would be completed in June or July of that year, 1960 [R. T. 123]. On the basis of these figures the Lomasney group expressed interest in the underwriting and Mr. Quing Wong, a representative of the Lomasney Company, was assigned to investigate Ecsco and to determine what interim financing was necessary to carry the company until public financing could be arranged. Appellant and Stanick told the Lomasney group that they needed about \$200,000 interim financing [R. T. 136]. The Lomasney Company instructed Stanick and Swaffield to obtain a national firm of accountants to prepare certified financial statements [R. T. 129]. In April, 1960, Stanick and Swaffield, through Mr. Grover Kreiger, hired Ernst & Ernst to perform an audit for the period ended April 30, 1960 [R. T. 944].

On April 30, 1960, Universal Ecsco Corporation (hereinafter "Ecsco Corp.") acquired all the assets and assumed all the liabilities of the partnership and Ecsco ceased to function as a partnership. Appellant and Stanick were the corporation's sole stockholders. Upon formation of Ecsco Corp., appellant became President and Treasurer and a director of Ecsco Corp., and Stanick was Chairman of the Board of Directors, and William F. Price, the attorney for Ecsco Corp., was Secretary and the third member of the three man Board of Directors, Exhibit 5 (pp. 1 and 2 [R. T. 35]. Mr. Guy Wilson was assigned by Ernst & Ernst as the senior accountant on the audit of Ecsco [R. T. 944].

5. THE AUDIT OF ECSCO CORP.
IN THE SPRING OF 1960

The field work on the audit commenced in early April, 1960 [R. T. 955, 956]. In connection with the audit Wilson communicated with vendors and confirmed that the amounts owed per Esco's books agreed with the vendors' records. Wilson proposed to request such a confirmation from Condeco. Kreiger indicated that the amount shown on the books was correct and a confirmation should not be sent. Nevertheless, Wilson mailed a confirmation request to Condeco [R. T. 957]. Benson informed Wilson that Ecsco owed Condeco substantially more than the \$5,000 reflected on Ecsco's books [R. T. 958]. Under these circumstances Wilson refused to proceed with the audit [R. T. 963, 1995].

Kreiger, acting on behalf of Swaffield and Stanick, communicated with Benson and asked him to sign a letter stating that Condeco had been paid in full for the Kansas City job [R. T. 1191, line 11 to 1192, line 3]. However, Benson refused to sign the confirmation because approximately \$75,000 remained unpaid on the Kansas City contract [R. T. 1199, line 15 to 1200, line 1]. A few days later Kreiger called Benson again and said that Ecsco had a chance to get new financing and that they would be willing to pay Condeco what they owed on the Kansas City job if Benson would give him fictitious credit memoranda, invoices, revised instructions to the Post Office Department concerning payouts on the Philadelphia job, and a document rescinding the December 16, 1959 Agreement between Ecsco and Condeco, and if Benson would also sign a confirmation to Ernst & Ernst in the form presented to him [R. T. 1200 to 1222]. After some discussion, Benson agreed and supplied five blank invoices to Kreiger because he wanted to be paid what was due him on the Kansas City job [R. T. 1207 and 1219]. Kreiger then backdated and prepared the invoices (Exhibits 17-F, G, H, I [R. T. 1201-1206]) in such a fashion that they purported to reduce Condeco's charges on the Kansas City job by approximately \$130,000 [R. T. 1204], and in turn Benson received the payment of \$74,287 (the balance of the amount due), together with a copy of the false invoices.

Kreiger contacted Wilson who examined the false credit memoranda, Exhibit 17-F, which had previously been supplied by Benson to Kreiger [R. T. 945, 946 and 947], and in reliance upon

this document and the confirmation as to their authenticity from Condeco, completed the audit which reflected a loss of only \$1,169 for the year ended December 31, 1959 [R. T. 1035, 1041]. Despite this machination to the books by Ecsco, the true loss on the Kansas City job was \$130,604 [R. T. 948].

Prior to the completion of the audit by Ernst & Ernst, the Lomasney firm issued a letter of intent dated April 21, 1960, Exhibit 12A, agreeing to underwrite 200,000 shares of Common stock of Universal Ecsco Corporation at \$4 per share, Exhibit 12A [R. T. 1517]. It was anticipated that this public offering would be made on or about September 1, 1960. In the interim the Lomasney firm was to use its best efforts to find purchasers for \$200,000 of debentures convertible into Common Stock of the company at \$2 per share. In late April, 1960, the first 100,000 of these debentures were placed with a client of Lomasney [R. T. 147-148]. The proceeds were used by Ecsco Corp. to cover bank overdrafts (\$30,000) and to pay the \$70,000 to Condeco.

In view of the time lag created by Wilson's refusal to continue with the audit, the audit period was changed from the two-month period ended February 29, 1960, to the four-month period ended April 30, 1960. After the audit report was completed by Guy Wilson for Ernst & Ernst, it showed a loss of \$25,715 for this four-month period ended April 30, 1960 as well as a loss of \$1,169 for the year ended December 31, 1959 [R. T. 146]. The report was transmitted to the Lomasney people [R. T. 146] and the \$25,000 loss contrasted with appellant's and Stanick's previous

representation to the Lomasney firm that there would be a profit for that period [R. T. 147, 148]. The loss was explained by appellant as being due to the use of the completed contract method of accounting [R. T. 148, 149, 154]. Appellant and Stanick represented to the Lomasney people that the Philadelphia job would be completed prior to August 31, 1960, and at that time the financial statements would show a very substantial profit [R. T. 155]. The public issue was postponed by the Lomasney firm until after financial statements could be obtained which would give effect to the completion of the Philadelphia job and thus, per appellant's representation show a profit [R. T. 155]. In the meantime, the Lomasney firm provided the remaining \$100,000 of interim financing [R. T. 156].

6. ALTERATIONS TO THE BOOKS
 PRIOR TO THE SECOND AUDIT

Appellant and Stanick were then instructed by Wong to obtain a certified financial statement for the four months ended August 31, 1960 [R. T. 156, 157]. Ernst & Ernst was again retained by appellant and Stanick to perform the audit. In August, 1960, prior to the commencement of Ernst & Ernst's audit, appellant instructed Harold Kavert (who had succeeded Kreiger, who was no longer with Ecsco Corp., as controller of Universal Ecsco) to prepare a statement showing the status of the Philadelphia job as reflected on

the books [R. T. 274]. From the books ^{5/} Kavert, on August 24, 1960, prepared a statement, Exhibits 14A and 14B [R. T. 282], which reflected that the books indicated a loss in excess of \$345,000 on the Philadelphia job since May, 1960 [R. T. 291]. Kavert made an adjustment on the schedule for the Condeco item which was actually applicable to the Kansas City job but transferred to the Philadelphia job as described previously [R. T. 293 to 297]. The schedules, Exhibits 14A and 14B, in substance reflected a loss on the Philadelphia job as follows:

Loss per books 5-1 to 8-25	\$ 345,000
Less profit taken to 4-30	<u>123,000</u>
Net loss on job	\$ 222,000
Adjustment for Condeco which charges belonged on Kansas City job	<u>\$ 73,355</u>
Net Loss	\$ 148,710

This statement was presented by Kavert to appellant and Stanick in late August, 1960 [R. T. 278]. The Condeco item was specifically called to appellant's attention at this time [R. T. 295]. After appellant examined the schedules he became very upset and told Kavert that "he could not sell a stock issue based upon this statement" and instructed Kavert to reverse the charges to the

^{5/} Exhibit 7A [R. T. 452], Exhibit 7B [R. T. 444], Exhibit 7D [R. T. 392], Exhibit 8A [R. T. 370 and 378], Exhibit 8B [R. T. 387], Exhibit 9A [R. T. 453], Exhibit 9B [R. T. 425], Exhibits 10A, 10B, 10C, 11A, 11B [R. T. 2380].

Philadelphia job and to allocate these costs to the new post office jobs (New Orleans, Houston, and Portland) [R. T. 280]. ^{6/}

Kavert and his assistant, Roxanne Johnston (an employee of Ecsco Corp. who worked in the Accounting Department) then proceeded to make the required changes on the Company's books [R. T. 295]. Costs which had originally been charged to the Philadelphia job were now allocated to the New Orleans, Houston, and Portland jobs (none of these jobs had even been started yet) designated as inventory on these jobs. The charges to each of the three jobs was made by determining the percentage of the cost of each of the three new jobs to their bid price and apportioning the costs of the Philadelphia job to each of the new jobs by this percentage (40% of the Philadelphia charges for this period to Houston, 40% to Portland, and 20% to New Orleans) [R. T. 295, 305]. The reclassification in the books of original entry was achieved by eradicating the original column heading (Philadelphia) and substituting the letter "P. O." as a new column heading for the months of May, June, July, and August 24, 1960. Thereafter, all entries in the Purchase Journal that were made were made under the heading "P. O." [R. T. 298]. This new column was then summarized and broken down into three inventory accounts (New Orleans, Houston,

^{6/} The New Orleans, Portland, and Houston Post Office contracts were awarded to Ecsco Corporation on June 20, 1960. Billings from Ecsco Corp. to the Post Office Department on each of the jobs commenced July 16, 1960. A schedule of all of the billings by Ecsco to the Post Office Department through August 31, 1960, on each of these jobs is set forth in the Pretrial Stipulation (p. 10), Exhibit 5 [R. T. 35].

Portland) and posted to the general ledger accordingly, Exhibits 8A and 8B [R. T. 297-367]. Other journal and ledger sheets, which could not be effectively altered, were replaced with new sheets and new entries were posted into the books accordingly, Exhibits 7B, 7D, 9B [R. T. 387-420, 435-445]. All postings thereafter made to the books reflected these changes, with the charges of the Philadelphia job being posted to these new jobs in accordance with the 40-40-20 ratio which Appellant approved [R. T. 448].

7. MISREPRESENTATIONS TO THE
AUDITORS DURING THE SECOND
AUDIT.

It was these altered books which were then shown to Ernst & Ernst who performed the audit for the four-month period ended August 31, 1960 [R. T. 761-764, 618, 619]. While engaged in that audit, Rodgers Dorr, a C. P. A. and the senior accountant assigned to the audit, noted that materials were being charged to the New Orleans, Houston, and Portland jobs on the books but that these materials were being shipped to Philadelphia [R. T. 772, 778]. Dorr raised a question concerning this [R. T. 778]. Kavert informed appellant that Dorr was questioning why materials were being shipped to Philadelphia and charged on the books to the three new jobs. Kavert testified:

"This purchase order showed on it the fact
that it was a Philadelphia purchase order.

"I asked Mr. Swaffield what we were to tell

Ernst & Ernst. Mr. Swaffield told me that we were to tell them that this material was being assembled or sub-assembled in Philadelphia for the new post office jobs.

"Q. Did this conversation relate to a purchase order which had been allocated to a job other than Philadelphia?

"A. Yes, sir, it did. This purchase order was a true Philadelphia purchase order. It was of a substantial amount, is the reason Rodgers Dorr of Ernst & Ernst questioned it. I believe it was a link belt purchase order. I think it was in the amount of \$46,000. This was a true Philadelphia Post Office expense [R. T. 457-458].

* * *

"A. According to the books this was being allocated on a pro rata basis to the three new post office jobs.

"Q. Was it in fact a charge to the Philadelphia job?

"A. It was in fact a Philadelphia cost."
[R. T. 459].

Kavert then explained to Dorr that materials for the three new jobs were being sent to Philadelphia for sub-assembly and storage [R. T. 459, 789].

Dorr also discussed with appellant and Stanick the fact

that materials for the New Orleans, Houston, and Portland jobs were going back to Philadelphia for assembly and storage [R. T. 789, 794]. In this regard, Dorr asked appellant, as well as Stanick and Kavert, why Ecsco Corporation was not making progress billings (billings for the three new post office jobs) for these materials as "there was a substantial amount of costs being incurred and yet the progress billings were not substantial" [R. T. 792]. In response to these questions, Dorr was informed by appellant that the company could not bill the materials until such time as they were actually shipped from Philadelphia to the site of the three new jobs [R. T. 792].

These statements to Dorr by appellant (and by Kavert which appellant instructed Kavert to make) that the materials for these three new jobs (New Orleans, Portland, and Houston) were being shipped back to Philadelphia for storage and/or sub-assembly work were totally false. James Leonard, the chief engineer and project engineer for Ecsco Corporation on the Philadelphia job, testified that the rented warehouse in Philadelphia was used for the sub-assembly and storage of components on the Philadelphia job only and that no sub-assembly work done was done there for any other jobs and no materials were shipped to Philadelphia for use on these three new jobs [R. T. 736]. Stanick likewise admitted in his testimony that this procedure was never followed [R. T. 1396]. In fact, per the testimony of Mr. Leonard, the Philadelphia job was not even completed until November, 1961 [R. T. 749].

During the audit, however, appellant and Stanick represented to Dorr that as of August 31, 1960, Ecsco's portion of the Philadelphia job was completed, but that the sub-contractor "Gallagher" was doing installation work and had not completed his part of the contract which was the only remaining work to be done [R. T. 798]. At the completion of the audit, and before the same was prepared in final form, appellant and Stanick, on October 24, 1960, represented to Ernst & Ernst in a letter, Exhibit 15E [R. T. 829] as follows:

"In connection with your examination of the financial statements of Universal Ecsco Corporation as of August 31, 1960, you have requested that we confirm to you certain representations implicit in the books of account and records kept by employees of the Company in the regular course of business"

[Emphasis added]

* * *

"The company has adopted the policy of recognizing contracts profit on a completed contract basis. Administrative and general expenses are allocated to contracts on the basis of direct costs. At August 31, 1960, the total cost incurred on open jobs amounted to \$544,609.73. Progress payments received on such jobs are reflected in the records as a liability. Due consideration has been given to estimated costs to complete these contracts.

It is our opinion that there are no loss contracts in progress at August 31, 1960. In addition to jobs completed during the period ended August 31, 1960, the following jobs were substantially complete at that date and accordingly were recorded as sales in the full amount of the applicable contract:

Customer	Total Contract	Sales Accrued	Estimated Cost to Complete
University of So. Calif.	41,659.00	4,165.90	1,262.25
Chevrolet <u>7/</u>	228,938.00	228,938.00	11,829.04
M. C. Gill	19,123.40	770.40	- 0 -
Phila. Post Office	1,212.451.72	17,814.25	- 0 -

"Adequate provision has been made for additional costs to be incurred on completed contracts. The only work remaining on the Philadelphia Post Office job is covered by the A. A. Gallagher Warehousing Corporation sub-contract which has been recorded in full and, therefore, includes all costs to be incurred thereunder."

7/ The lengths of appellant's machinations to hide the true facts from the auditors extended not only to the Philadelphia job, but also to the Chevrolet matter; as, appellant in the latter part of August, 1961, instructed Kavert not to enter any more invoices in connection with the Chevrolet job and "to pull the purchase orders in connection with any job that would come in", as the Chevrolet job was then showing a loss [R. T. 461 and 462]. Kavert, pursuant to these instructions, held out \$32,000 worth of invoices which are not reflected in this figure [R. T. 463].

8. THE COMPLETION OF THE
SECOND AUDIT.

On the basis of the altered books and false explanations of appellant and Stanick, the Ernst & Ernst audit was concluded in late October, 1960, and copies of the audit report were submitted to the Lomasney firm [R. T. 158]. In spite of the alterations to Ecsco Corporation's books and the shifting of the costs of the Philadelphia job to the three new jobs (where under the completed contract method they were reflected as an asset in the category of Contracts in Process) the Financial Statement showed a loss of \$26,994.00 for the four month period ending August 31, 1960 [R. T. 159]. Additionally, the report reflected inter alia that a retained earnings deficit of \$26,994 existed and that the contracts in process totaled \$544,600. The audit report prepared by Mr. Dorr, of Ernst & Ernst, reflected the figures set forth in Exhibit 1E (pp. 44, 45 & 46) [R. T. 37, 783] (See Appendix A). Following the receipt of the audit report, Mr. Wong, of the Lomasey firm, contacted appellant and Stanick and informed them that because of the loss shown by the audit, the Lomasney Company did not believe it could undertake the underwriting at that time for Ecsco Corporation [R. T. 160].

In desperation, Stanick traveled to New York to discuss the matter with Mr. Lomasney of the Lomasney Company. During a meeting between Stanick, Lomasney and Wong, Mr. Lomasney called Stanick a liar since appellant and Stanick had represented

that there was going to be a very substantial profit on the Philadelphia post office job, and the audit had not reflected any profit, but rather a loss of almost \$27,000 [R. T. 163-164]. The Lomasney firm called off the underwriting for Ecsco Corporation; thereafter, Stanick was introduced to Mr. Shinn of Shinn Engineering, Inc. [R. T. 2001].

9. ECSCO CORPORATION COMBINES
WITH SHINN ENGINEERING, INC.

At the same time Ecsco Corporation had been seeking an underwriting, a corporation known as Shinn Engineering, Inc. was also seeking public financing and had also engaged the firm of Myron A. Lomasney and Company in connection with a prospective underwriting [R. T. 1849]. The Lomasney firm concluded that it would be acceptable if Ecsco Corporation were combined with Shinn Engineering, Inc. and the underwriting be issued on behalf of these two companies [R. T. 1848-1849]. After various discussions between appellant, Stanick, principals of Shinn Engineering, Inc. (namely Clifford Shinn, the president), and the Lomasney Company, it was determined that the companies should merge and "go public" [R. T. 1849-1855]. Prior to the consummation of the merger, Clifford Shinn insisted that Ernst & Ernst be brought back to the premises of Ecsco Corporation to bring the financial statements up to date [R. T. 1862]. During discussions between appellant and Shinn, prior to the merger, Shinn inquired

of appellant where the inventory was for the three new jobs, which was reflected on the audit report as Contracts in Process as of August 31, 1960, in the amount of \$542, 610 (Exhibit 1E, p. 44) [R. T. 37]. Appellant informed Shinn that the inventory was located in various warehouses around the country [R. T. 2241-2242].

On November 14, 1960, Shinn Industries, Inc. was incorporated and acquired through an exchange of stock all of the outstanding capital stock of Shinn Engineering, Inc. and Ecsco Corporation (Exhibit 1E, p. 5) [R. T. 37]. Following the merger of the companies, appellant became Chairman of the Board of Shinn Industries, Inc. and Stanick became a Director and Executive Vice President. Clifford L. Shinn was a Director, as well as President (Exhibit 5, pp. 2, 3) [R. T. 37]. Appellant and Stanick continued to hold the offices in Universal Ecsco Corporation which they held prior to the merger.

10. THE FILING OF THE REGISTRATION STATEMENT AND AMENDMENTS WITH THE S. E. C.

On November 29, 1960, the combined company, Shinn Industries, Inc., filed a registration statement on Form S-1 under the Securities Act of 1933, as amended, with the United States Securities and Exchange Commission (Exhibit 1A) [R. T. 37]. Amendments to the registration statement were filed with the Securities and Exchange Commission on February 16, 1961

(Exhibit 1B) [R. T. 37] and March 27, 1961 (Exhibit 1C) [R. T. 37]. A Post-Effective Amendment was filed with the Commission on April 6, 1961 (Exhibit 1D) [R. T. 37].

Each of these filings with the S. E. C. included Ecsco Corporation's Statement of Financial Position and a Statement of Income and Retained Earnings Deficit for Universal Ecsco Corporation and Ecsco (a partnership), as set forth in Appendix A hereto. However, said financial statements filed in each of the registration statements did not include the penciled notations which are in fact the true figures that should have been reflected in these statements.

In December, 1960, after the registration statement was filed, but before the amendments thereto were filed, appellant requested Kavert to determine what the actual costs or true costs were on each of the new post office jobs, i. e., New Orleans, Houston, and Portland [R. T. 465, 466]. Kavert proceeded to go back to the books and determine the true costs on the new jobs and reported these facts to appellant each month from December, 1960, to May, 1961 [R. T. 466-469].

In June, 1961, after the stock had been offered to the public, Mr. Shinn noted that Universal Ecsco had consumed more cash than had been anticipated in cash flow projections. Shinn questioned appellant as to the reasons for the discrepancies and appellant's explanation was unsatisfactory to Mr. Shinn. [R. T. 1875-1880]. After an investigation Shinn accused appellant of cheating Shinn Industries and stated that Shinn Industries had not "received what

they had bargained for" [R. T. 1881]. Thereafter, Shinn requested Mr. Guy Wilson, who was in charge of the two previous audits, to return to Ecsco to determine whether the Contracts in Process figure was or was not correctly stated [R. T. 1886]. In August, 1961, Wilson conducted a reaudit [R. T. 1887]. Based upon the reaudit, Wilson concluded that the figures in the books had been altered prior to the second audit and that the amounts shown per Contracts in Process at August 31, 1960, were overstated by \$372,137 and the amounts included in the registration statement as Contracts in Process in the amount \$544,610 should in fact have been \$172,473 [R. T. 930, 936]. See also Exhibit 16A, Mr. Wilson's work papers from the reaudit [R. T. 931]. Additionally, Mr. Wilson testified that the net loss for the year ended December 31, 1959 of Ecsco would be increased from \$1,164, the amount reflected in the registration statement, to \$130,604 (See Appendix A) [R. T. 949].

At the completion of Ernst & Ernst reaudit in August, 1961, and the establishment of the inventory deficiencies, and understatement of losses, appellant and Stanick were confronted by Shinn about the deficiency. Thereafter, they each executed a promissory note to Universal Ecsco in the amount of \$186,068.60, which totals \$372,137.20, the amount of inventory deficiency as determined by Ernst & Ernst, (Exhibit P) [R. T. 1898] in favor of

11. SUMMARY

The common stock of Shinn Industries, Inc. which was registered pursuant to the registration statement and amendments thereto was all sold to the public by May 1961. A Comparison of the losses of Universal Ecsco reported in the registration statement and amendments thereto and the actual losses incurred as proved at trial are set forth as follows:

	Year Ended <u>12-31-59</u>	Four Months Ended <u>8-31-60</u>	Seven Months Ended <u>11-30-60</u>
Net Loss As Reported in			
Registration Statement	\$ 1,169	\$ 26,994	\$171,655
Costs Applicable to Philadelphia			
Contract which were reported			
as costs incurred on New			
Orleans, Portland & Houston			
(contracts in process)			
8-31-60 and 11-30-60		(372,137)	(372,137)
Shift of Costs applicable to			
Kansas City contract (year 1959)			
to Philadelphia contract (four			
months ended 8-31-60)	(134,513)	(\$134,513)	(\$134,513)
Net Loss for Respective Periods After			
Adjustments set forth above	<u>(\$135,682)</u>	<u>(\$264,618)</u>	<u>(\$409,279)</u>

ARGUMENTA. INTRODUCTION

Appellant uses a scatter gun approach in enumerating his specifications of errors and alleges inter alia as error that the judgment is not supported by any substantial evidence, the judgment is contrary to the weight of the evidence and the judgment is contrary to law, pages 17 and 18 of Appellant's Brief.

The record of this trial, which continued over a period of six weeks, comprises in excess of 2,500 pages. Appellant has not made a proper formal statement of facts in this case, nor in the Statement of Facts has he indicated the references to the record wherein these facts allegedly appear. Appellee has given the facts in this case an exhaustive treatment.

Appellee questions whether this Court should even consider the allegation of insufficiency of evidence where the moving party has failed to state with particularity wherein and how the evidence was insufficient. It hardly seems to be the function of this Court to make a "quest for error" on its own initiative when the moving party fails to so state, and fails to indicate where the search should commence.

This Court, in passing upon Appellant's specifications of error, must view the evidence, together with all reasonable inferences in the light most favorable to the government. Noto v.

United States, 367 U.S. 290 (1961) and Byrne v. United States, 327 F.2d 825 (9th Cir. 1964). When the evidence is so viewed, it indicates a willful and deliberate attempt and effort on the part of Appellant and his co-defendant Stanick to knowingly and willfully cause the filing of false and misleading financial statements concerning the financial position of Universal Ecsco and its predecessor partnership Ecsco with the S. E. C. for the purpose of offering the securities of Shinn Industries, Inc. to the public as well as a classical case of conspiratorial conduct surrounding the filing and the filing of said Statements.

Incorporated herewith as Appendix B are the comments of the learned trial judge on the evidence which was presented at trial. While the remarks of Judge Hill were comments and not findings, these are included herewith for the reason that they are relevant and material and reflect the considerations of the trial court of the evidence in finding Appellant guilty as charged.

B. THE EVIDENCE WAS SUFFICIENT TO CONVICT APPELLANT OF ACTING IN CONCERT WITH STANICK AND OTHERS AND CONSPIRING TO OBSTRUCT THE LAWFUL FUNCTIONS OF THE S. E. C. BY FILING A REGISTRATION STATEMENT AND AMENDMENTS THERETO CONTAINING FALSE STATEMENTS ABOUT ECSCO AND UNIVERSAL ECSCO CORPORATION'S FINANCIAL CONDITION AS CHARGED IN COUNT 1 OF THE INDICTMENT.

That there are four essential elements required to be

proved in order to establish the offense of conspiracy. These elements are:

1. That the conspiracy alleged in the indictment was willfully formed and was existing at or about the time alleged;
2. That the accused willfully became a member of the conspiracy;
3. That one of the conspirators thereafter knowingly committed at least one of the overt acts charged in the indictment at the time and place alleged; and
4. That such overt act was knowingly done in furtherance of some object or purpose of the conspiracy as charged.

Ingram v. United States, 360 U.S. 672 (1959);

Brothers v. United States, 328 F.2d 151

(9th Cir. 1964);

United States v. Falcone, 311 U.S. 205 (1940).

Appellee contends that the State of Facts, set forth, supra, conclusively demonstrates that all of these elements were proved by overwhelming evidence as under the general law of conspiracy, a common course of conduct between the defendants and/or third persons need not be based upon expressed agreement - tacit understanding is enough. Because the nature of a conspiracy is furtive and secret, neither the existence of the common scheme nor the fact that the defendants participated in it need be proved by direct evidence; both may be inferred from a development and collocation of circumstances.

Glasser v. United States, 315 U.S. 60 (1942);

Jefferson v. United States, 340 F. 2d 193

(9th Cir. 1965);

Daily v. United States, 282 F. 2d 818

(9th Cir. 1960).

Appellee submits that it has been proven more than a tacit understanding with regard to the conspiracy alleged. In late 1959, Appellant and Stanick realized they needed public finance and indeed sought it from various underwriters in New York City [R. T. 1493 and 1494]. In discussing the matter with Myron A. Lomasney and Company, Appellant had to use false financial statements indicating that Ecsco made a profit for the year ended December 31, 1959, when they, in fact, had a loss for that period in excess of \$125,000 [R. T. 126-130].

In fact, the entire agreement with Myron A. Lomasney and Company was based upon Ecsco's having a "profitable period" as represented by Appellant and Stanick [R. T. 155].

There can be no doubt that the fraudulent bookkeeping pattern began with the entry in December, 1959, the purpose of which was to shift approximately \$125,000 of costs applicable to the Kansas City job, Ecsco's first complete major contract, to the Philadelphia job then in progress [R. T. 511-518]. The effect

of this shift was to understate losses for the year 1959 by \$125,000, thus concealing substantial losses incurred by Ecsco during its first full year of operations [R. T. 948].

In order to properly conceal this loss from the underwriter, it had to first be concealed from the auditors which required the obtaining of false invoices and the credit memorandum from Condeco [R. T. 945-947]. Indeed, the underwriting scheduled to take place after the audit for the four-month period ended April 30, 1960, was postponed because, in fact, a loss was shown for that period in the amount of \$25,715 [R. T. 146].

Appellant attempted to explain this loss to the underwriters as being due to the accounting methods of the auditors [R. T. 147-148]. Appellant and Stanick then promised Lomasney and Company as they had previously that the results of the August 30, 1960, audit would show a profit because the Philadelphia job would be complete. Appellant's motives and intentions became crystal clear when after seeing the loss reflected on the schedules prepared by Kavert on the Philadelphia job (Exhibits 14A and 14B), he informed Kavert that he could not sell a stock issue based upon the loss and then instructed Kavert to "allocate the costs in connection with the Philadelphia job to the new post office jobs" [R. T. 280]. When Mr. Dorr inquired as to the reason for sending materials for these three new jobs to Philadelphia, Appellant, Stanick and Kavert (pursuant to Appellant's instructions) replied that they were being sent to Philadelphia for sub-assembly [R. T. 457-458]. The entire scheme of Appellant and Stanick was

directed toward the sale of its stock to the public in order to obtain the very vital and necessary financing which it needed. It was based upon the altered books of Ecsco and upon the misrepresentations of Appellant, and Stanick, that the audit report for the period ended August 30, 1960, was prepared and included in the registration statements filed with the S. E. C. Certainly, the government proved more than a tacit understanding, and the proof was not only by circumstantial evidence, but also by very compelling direct evidence.

See Glasser v. United States, 315 U.S. 60, 80
(1942).

1. THE COMMISSION OF ALL OVERT
 ACTS ALLEGED WAS PROVEN.

Appellant alleges at page 22 of his Brief:

"Sixteen separate overt acts are set forth in the indictment, and we strongly contend that none of these overt acts as alleged were proved by the government by any substantial evidence, or at all, or beyond a reasonable doubt to justify a conviction."

In the Argument that follows Appellant's contention, wherein he attempts to sustain his position, it must be noted that for the most part he relies on the testimony of Appellant, ignoring the plethora of evidence adduced by all the other witnesses, and when Appellant acknowledges other evidence, he attempts to refute

said evidence by the mere characterization of such testimony was "false and uncorroborated, evasive, inconsistent and incredible" (page 29, Appellant's Brief).

It is, of course, fundamental that overt acts which are alleged and proved need not themselves be a crime; the function merely is to show that the conspiracy is at work. Yates v. United States, 354 U.S. 298, 334 (1957). And, the government need not prove all the overt acts charged in the indictment; proof of one is sufficient. Robinson v. United States, 210 F.2d 29, 32 (D. C. Cir. 1954).

With regard to each of the overt acts, we will review them seriatim and briefly indicate the evidence which was introduced which conclusively demonstrates the commission, not only of the overt acts, but of the substantive offense charged.

a. Overt Act No. 1 charged that Appellant, Stanick and Kreiger on December 31, 1959, caused adjusting entries to be made in the books of account of Ecsco which reduced the net loss for 1959 in the amount of \$125,770 [C. T. 6]. This act was proved through the testimony of Mr. Kavert, who testified that he was instructed by Mr. Kreiger early in the month of January, 1960, before the books of December, 1959, had been closed, to reverse \$129,435 of costs out of the Kansas City job, thus reducing the expenses on that job [R. T. 514, 518]. See Exhibit 14H [R. T. 520].

b. Overt Act No. 2 charged that on or about April 1, 1960, Appellant and Stanick had a conversation in Los Angeles

with Quing Wong, a representative of Lomasney and Company, concerning the underwriting of securities of Universal Ecsco [C. T. 7]. This act was proven directly by the testimony of Mr. Wong who stated that he came to California in the first week of April, 1960, for the purpose of making an investigation of Universal Ecsco and that during the first week of April Wong had numerous discussions with Appellant and Stanick concerning the proposed underwriting [R. T. 131].

c. Overt Act Nos. 3 and 4. Overt Act No. 3 charged that on or about August 24, 1960, Appellant and Stanick had a conversation with Harold Kavert concerning shifting the loss incurred in the Philadelphia job to future post office jobs in order to facilitate the proposed sale of stock to the public. Overt Act No. 4 charged that Kavert at Appellant's instructions made alterations in the books of account of Universal Ecsco Corporation thereby reducing the loss on the Philadelphia post office job in the amount of \$372,137 and increasing the assets by allocation of these jobs to contracts in progress [C. T. 7].

Harold Kavert, the head of Ecsco's accounting department, in August, 1960, unequivocally testified that in the latter part of August, 1960, Appellant requested him to prepare statements showing the costs for the Philadelphia job [R. T. 274]. Kavert prepared the statements (Exhibits 14A and 14B) which reflected a whopping loss on the Philadelphia job, and presented them to Appellant in Stanick's presence [R. T. 275, 278].

Kavert testified that when Appellant saw this statement he

"became quite upset" and informed Kavert that he (Appellant) could never sell a stock issue based on this statement. Appellant then instructed Kavert to reallocate the Philadelphia costs to the three new post office jobs [R. T. 280]. Appellant asserts "unequivocally" that Kavert's testimony "in essential areas was false and uncorroborated, evasive, inconsistent and incredible". The record establishes that Appellant's "assertions" in this regard are totally unsupported by the record. Kavert's testimony was corroborated by inter alia the following:

(a) The loss schedules prepared for the Philadelphia job on August 24, 1960, at Appellant's direction (Exhibit 14A and 14B). Appellant denied ever requesting Kavert to prepare these schedules and denied seeing them. Rhetorically, we pose this question: Why would the schedules have been prepared if it were not for the fact that someone had asked that it be done? It must be remembered that Appellant and Stanick were the sole stockholders and chief executive officers of Ecsco. Everything they had was at stake. Further, the underwriting which Appellant and Stanick were so desperately seeking required that a profit be shown per Appellant's representations [R. T. 155].

(b) The actual alteration of the books through the eradications of the column heading "Philadelphia" and the substitution of new column headings entitled "P. O. Others" in the books of original entry which books were produced at the trial and introduced into evidence as Exhibits 7A, 7B, 7D, 8A, 8B, 9A, 9B, 10A, 10B, 10C, 11A and 11B.

(c) The original ledger sheets and journal sheets which were removed because they could not be effectively altered from the books of Universal Ecsco Corporation and replaced by new sheets reflecting false data (Exhibits 7B, 7D and 9B).

(d) The fact that Mr. Dorr was told by Appellant and Stanick that sub-assembly work for the new jobs was being done in Philadelphia and that this was the reason the records reflected the shipment of materials for the new job to Philadelphia [R. T. 794].

(e) The statement by Appellant in response to Mr. Dorr's question why the company was not billing progress payments for materials that were sent back to Philadelphia for assembly and self-assembly work for these new jobs "that material costs could not be billed until such time as they were actually shipped from Philadelphia to the sites where the new jobs were going to be worked on." [R. T. 791-793].

(f) The representation by Appellant orally to Mr. Dorr that the only work remaining on the Philadelphia job was the work that had to be completed by the sub-contractor "Gallagher" and that Ecsco had completed their portion of what was required to be done [R. T. 832]. As well as, the written representations by Appellant and Stanick to this same effect, continued in Exhibit 15E.

d. Overt Act No. 5 charged that on October 24, 1960, the Appellant and Stanick caused a letter to be sent to Ernst &

Ernst confirming the fact that the Philadelphia post office job was substantially complete [C. T. 5]. This letter, containing false representations as noted supra, was introduced in evidence as Exhibit 15E [R. T. 829]. The letter is signed by Appellant as well as Stanick, and Appellant discussed it at length with Mr. Dorr prior to the time he executed it [R. T. 1795-1802].

e. Overt Act Nos. 6, 8 and 10 charge Appellant and Stanick with signing Amendment Nos. 1 and 2 and Post-effective Amendment No. 1, respectively, of the registration statements [C. T. 788]. Overt Act Nos. 7, 9 and 13 charge Appellant and Stanick with causing Amendment Nos. 1 and 2 and the Post-effective Amendment to be filed with the S. E. C. [C. T. 7-8]. Each of Overt Acts Nos. 6, 7, 8, 9, 10 and 13 is clearly proven by Exhibits 1A, 1B, 1C and 1D [R. T. 37] which are the registration statement and amendments thereto filed with the Securities and Exchange Commission on the dates indicated. Each such registration statement bears the signature of Appellant in his capacity as the Chairman of the Board of Shinn Industries, Inc. and President of Universal Ecsco. Clearly, there could be no clearer proof of the commission of these acts.

f. Overt Act Nos. 11, 12, 14, 15 and 16 charge Appellant and Stanick with causing confirmation of stock purchases to be sent to the various stock purchasers of Shinn Industries, Inc. stock in New York and California. Of course, it was the proceeds from the sale of the securities which Appellant was so desperately seeking. In connection with the sale of stock to the public by a

broker-dealer such as Lomasney and Company, the broker-dealer is required to send to the purchasers a confirmation of purchase (Rule 15c1-4, Confirmation of Transactions of the General Rules and Regulations under the Securities Exchange Act of 1934, as amended). 17 C.F.R. 240.15c1-4. That Appellant must bear the consequences of these mailings is clear since if in the offer and sale of securities one does an act with knowledge that the use of the mails will follow in the ordinary course of business or such use is reasonably foreseeable, the parties to the scheme are chargeable with the mailings.

Danser v. United States, 281 F.2d 492, 496

(1st Cir. 1960).

It was stipulated at trial that each of the individuals who were named in Overt Act Nos. 12 through 16, inclusive, as having received a confirmation of sale, did in fact make a purchase of Shinn Industries stock in April or May, 1961, from Myron A. Lomasney and Company. Pretrial Stipulation, Exhibit 5, pp. 6-7 [R. T. 35]. The actual confirmation received by Mr. Carl Davis (Overt Act No. 12), Mr. Livio Pinterpe (Overt Act No. 14) and Mr. Wilson H. Miller (Overt Act No. 15) was received in evidence pursuant to said Stipulation as Exhibits 2A, 2B and 2C, respectively [R. T. 41, 43]. And, it was stipulated in said Exhibit 5 that Mr. William (Overt Act No. 16) did, in fact, received a confirmation of the purchase of his shares.

In the instant case when the government proved not only one of the overt acts alleged, but all 16 beyond any and all

reasonable doubt.

C. THE EVIDENCE WAS SUFFICIENT
TO CONVICT APPELLANT OF
KNOWINGLY AND WILLFULLY
CAUSING FALSE STATEMENTS OF
MATERIAL FACTS TO BE MADE IN
THE AMENDMENTS TO THE REGISTRA-
TION STATEMENT AS CHARGED IN
COUNTS TWO, THREE AND FOUR OF
THE INDICTMENT.

Each of the substantive offenses (Counts 2, 3 and 4) charge that the false statements Appellant caused to be made were made in each of the amendments to the registration statement and related to the financial condition of Universal Ecsco Corporation and its predecessor partnership, Ecsco. With regard to Ecsco, the false statement was contained in the Statement of Income in the registration statements and stated that the net loss of Ecsco for the year ended December 31, 1959, was \$1,169 when in fact it was in excess of \$125,000.

With regard to the false statements concerning Universal Ecsco Corporation, the false statements were:

(a) In the Statement of Financial Position, the contracts in process for the four-month period ended August 31, 1960, were \$554,610 when, in fact, these contracts in process were less than \$175,000.

(b) In the Statement of Income, the net loss of Universal Ecsco Corporation for the four-month period ended August 31, 1960, was stated as \$26,994 when, in fact, the net loss

for this period exceeded \$395,000.

(c) In the Statement of Financial Position, the retained earnings deficit of Universal Ecsco Corporation as of August 31, 1960, was represented as \$28,944 when, in fact, the deficit exceeded \$395,000.

The facts set forth in Appellee's Argument relating to the conspiracy charge, Count 1 of the indictment, are appropos to and demonstrate Appellant's guilt of the substantive counts as well and, that the acts of Appellant in connection with the preparation and filing of the false statements were knowingly and willfully done, i. e., voluntarily and intentionally. United States v. A&P Trucking Company, 358 U.S. 121 (1958); Morissette v. United States, 342 U.S. 246, 250, 252, 264 (1952).

The case of United States v. Danser, 26 F.R.D. 580 (1959), aff'd, 281 F.2d 492 (1st Cir. 1960), which Appellant cites in his brief (p. 58), does not lay down any principle of law that is inapposite to the rulings and findings of the trial court in this case. While the facts of the case are not discussed in the court's opinion (it is a reproduction of the court's charge to the jury), the offenses charged in Danser related to §17(a) of the Securities Act of 1933, 15 U.S.C. §77q(a), and not §77x, Title 15, U.S.C., as do Counts 2, 3 and 4 of the present indictment. In Danser the court charged the jury:

"The Government must show that Danser actually knew that the particular statement in question was false. This does not mean that the Government

has to offer the testimony of some witness who told Danser that the particular statement was false, or to offer the testimony of some witness who heard Danser say that the particular statement was false. The Government may rely upon circumstantial evidence. That is, the Government has a right to present evidence on topics such as how the executives of the company reported to Danser, what types of oral and written reports were made to Danser, what interest Danser took in financial details, and what significance particular matters had in connection with Danser's role in the enterprise as a whole" [Emphasis added]

* * *

"I instruct you as a matter of law that if before a person makes a technical financial statement . . . [a] he in good faith selects a competent accountant or lawyer, and (b) he places all the relevant facts known to him before that competent expert, and (c) he receives from that expert an opinion as to how these facts may fairly be stated, and (d) he believes that expert opinion was rendered in good faith and (e) in reasonable reliance upon that expert opinion he uses a form of statement which corresponds with the expert opinion, you cannot find that the person who so relied had

knowledge that the statement was false or intended to defraud." (pp. 586-587).

Certainly in the case at bar Appellee has met the requirements as set forth in Danser as demonstrated in the Statement of Facts set forth herein, supra. Accordingly, Appellant's reliance upon this case is woefully misplaced.

D. THE TRIAL COURT DID NOT COMMIT ERROR IN ITS RULINGS RE JENCKS ACT STATEMENTS.

Appellant contends that the trial court "erroneously ruled" in connection with the enforcement of a stipulation concerning the Government's failure to submit Jencks Act statements within 48 hours prior to the testimony of three of the Government's eleven witnesses (Appellant's Brief pp. 50-52). The allegation is made with reference to testimony of Government witnesses Myron A. Lomasney, Rodgers Dorr, and rebuttal witness Clifford Shinn. These Jencks Act Statements were the testimony taken by the S. E. C. in its private investigation. Appellant does not contend that the statements were not furnished him prior to his cross-examination, since he was in fact, furnished them, but rather "that the defense was placed at a disadvantage and was unduly handicapped in having [sic] an opportunity to more carefully study and evaluate the prior testimony." (Appellant's Brief p. 52).

At the outset it must be noted that 18 U. S. C. 3500 requires

the following:

"(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified."

The facts surrounding the Jencks Act statements for these witnesses are as follows:

(a) With regard to Myron Lomasney, the Government's first witness, on the first day of trial (June 27, 1966) Appellant, through his counsel, complained to the Court that he had just received a volume of testimony relating to testimony of Mr. Myron Lomasney before the Securities and Exchange Commission [R. T. 23]. Mr. Maidman stated [R. T. 24]:

" . . . but it is my understanding that Mr. Mattison also made a call, and was told that he is welcome to come down to the office of the United States Attorney and see the statements; that his interpretation, as he understood it, was that they were making them available to let him see them and take extracts therefrom. And he was also requested to convey this information to me.

"Now I heard this comment."

When the Court requested to hear from the Government it was informed by Government counsel that: (1) counsel did indeed

make the statements available to the various defense counsel and (2) Mr. Mattison, counsel for defendant Stanick, informed Mr. Maidman of the fact the transcripts would be available in the U. S. Attorney's office (as the Government did not wish to let the statements be taken out of its possession) and (3) Mr. Mattison visited the U. S. Attorney's office on Saturday afternoon, June 25, 1966, for the purpose of reviewing S. E. C. transcripts, including Mr. Lomasney's [R. T. 25, 26]. Government counsel then informed the Court:

"Your Honor, it has been called to my attention, through the United States Attorney's Bulletin, which is a publication issued from the Attorney General's office, that all materials that the Government supplies as Jencks Act [materials] . . . must be returned to the Government for the obvious reason that we don't want it to be used later as a part of any private proceeding or litigation.

"Now, we will be more than happy to make these available at all house in our office. We were in the office for 12 hours Saturday and 14 hours yesterday [Sunday]. We will continue to be available on almost an around-the-clock basis in the United States Attorney's office." [R. T. 26, 27].

During the course of this discussion the Court pointed out to Appellant's counsel that it was late in the morning and that the Court had many sentences on its afternoon calendar. Therefore,

Appellant's counsel would have from the noon recess and thereafter for the reading of Mr. Lomasney's statement [R. T. 26]. In the afternoon of Monday, June 27, 1966, Mr. Lomasney was called as the Government's first witness and cross-examination of Mr. Lomasney started that same afternoon by Appellant's counsel [R. T. 86]. Thereafter, in lieu of calling Mr. Lomasney back to testify on June 28, 1966, all parties stipulated that certain questions propounded to Mr. Lomasney at a hearing before the Securities and Exchange Commission on August 16, 1962, and Mr. Lomasney's answers to those questions, may be read into the record in lieu of Mr. Lomasney's being required to come back to testify [R. T. 93]. Defendant's counsel then proceeded to read into the record almost all of the transcript of S. E. C. proceedings given by Mr. Lomasney [R. T. 96-109].

(b) With regard to Rodgers Dorr's Jencks Act statement, the S. E. C. transcript was mailed to Mr. Mattison, counsel for Stanick, on Friday, July 1, 1966, addressed to Mr. Mattison at his office. Mr. Mattison had previously informed Government counsel that he would be working the 2nd, 3rd and 4th of July at his office with the expectation that it would be passed on to Appellant's counsel, Mr. Maidman [R. T. 754].

On July 6, 1966, at approximately 3:00 o'clock p. m. , Rodgers Dorr was called as a witness and testified in behalf of the Government. Mr. Dorr's testimony continued on direct examination until approximately 11:00 o'clock a. m. , July 7, 1966 [C. T. 70], when cross-examination commenced [R. T. 836].

During the cross-examination of witness Dorr, Appellant read into the record purported "impeachment" ^{8/} [R. T. 893-897]. At the conclusion of Mr. Dorr's redirect examination (the afternoon of July 7), Mr. Dorr was excused and Appellant raised no objection or made any statement whatsoever about not having had sufficient opportunity to read the transcript [R. T. 907]. On August 2, 1966, Mr. Dorr was recalled to testify in rebuttal and cross-examined by Appellant's counsel [R. T. 2321-2330]. At no time was any objection or protest to the Court made by Appellant that he had not had sufficient time in which to study the S. E. C. transcript of Mr. Dorr's testimony.

(c) With regard to Clifford L. Shinn, on Tuesday, August 2, 1966, during the defendants' presentation of their case, the Government was required to call Mr. Shinn (who was a rebuttal witness) out of order since two defense witnesses who were expected were not then available [R. T. 2237]. Appellant's counsel had been given Mr. Shinn's testimony, S. E. C. transcripts, that morning [R. T. 2239]. Mr. Shinn's testimony as a witness was limited by the Government to two very narrow and specific areas. The first area of questioning related to whether or not Appellant had ever told Mr. Shin that the inventory for the new jobs, i. e., New Orleans, Houston and Portland, was located at warehouses throughout the country [R. T. 2239, 2240]. The second related to a conversation which defendant Stanick had with Mr. Shinn

^{8/} A comparison of Mr. Dorr's S. E. C. testimony (read into the record) with his testimony at trial is entirely consistent.

following the discovery of the false financial statements by Mr. Shinn [R. T. 2243]. Mr. Shinn was called strictly as a rebuttal witness to testify as to statements made by Appellant wherein Appellant at the trial denied making such previous statements. Following this very brief testimony on direct, Mr. Shinn was questioned at length by counsel for Appellant as well as counsel for defendant Stanick [R. T. 2250-2285]. Counsel for both Stanick and Appellant informed the Court at approximately 12:00 o'clock noon that they had no further questions of Mr. Shinn. Government counsel then stated to the Court who was about to excuse the witness and adjourn for the noon recess:

"I would like to point out before we excuse this witness that in view of Mr. Maidman's statements concerning the so-called Jencks Act statement, the Government will ask this witness to remain or at least to return at 2:00 o'clock, if that is convenient with the Court, or 1:45, in the event that there are any questions that defense counsel wish to put to the witness if that meets with the Court's concurrence.

"THE COURT: Very well . . . we will ask him to be back here at 1:45." [R. T. 2286].

Earlier, Government counsel had pointed out to the Court and Appellant's counsel, as well as Stanick's counsel, that the testimony that Mr. Shinn gave was covered in approximately eleven pages of testimony in the S. E. C. transcript [R. T. 2266].

Government counsel then outlined the pages as to where the testimony could be found in each of the transcripts that was covered on direct [R. T. 2266].

Following the noon recess, counsel for defendant Stanick moved to reopen cross-examination [R. T. 2228], and proceeded to read into the record approximately eleven pages of testimony which Mr. Shinn gave before the S. E. C. [R. T. 2290-2304]. At this time counsel for Appellant also moved to reopen cross-examination of Mr. Shinn for the purpose of reading a portion of Mr. Shinn's deposition into the record [R. T. 2304-2306]. Following this reopening of cross-examination and the conclusion of Appellant's questions to Mr. Shinn, the Court inquired of counsel:

"THE COURT: . . . may he [Mr. Shinn]

be excused? Is that agreeable, gentlemen?

"MR. MAIDMAN: Yes, your Honor.

"MR. MATTISON: Yes, your Honor."

and thereupon the witness was excused [R. T. 2307].

Although final argument in the case did not begin until the morning of the following day, August 3, 1966, at no time did counsel for Appellant object to or request the opportunity for additional time to cross-examine the witness Shinn regarding the S. E. C. transcripts.

It is submitted that Appellant's allegations in regard to the so-called Jencks Act statements have not, nor could he, demonstrate that he has suffered any harm. Indeed, it is even questionable what it is that Appellant contends:

"We contend that this afforded opportunity was inconsistent with affording defendant a fair trial and particularly did violence to the Court's own order." [Appellee's Brief, p. 51].

A witness may be recalled or a matter may be reopened for the reason that he did not have sufficient opportunity to properly cross-examine the witness on the grounds that he did not receive the "Jencks Act materials timely". Appellant has not demonstrated that he was denied due process of law or, even an inference of prejudice regarding the "untimely presentation of Jencks Act materials". cf. Worldwide Automatic Archery, Inc. v. United States, 356 F.2d 834 (9th Cir. 1966). Nor is there any allegation, and in fact there could be none, that the Government has not complied with the Jencks Act as stated in 18 U. S. C. §3500. Clearly, in view of the extended cross-examination and reading into the record the provisions of the various witnesses' testimony as part of Appellant's cross-examination and expressly consenting to the excusal of all witnesses and not requesting to recall the witness, no error was committed. If in fact the Court concludes it was error under the circumstances of this case, it must conclude that it was harmless error pursuant to Rule 52, Federal Rules of Criminal Procedure. See Bushaw v. United States, 353 F.2d 477 (9th Cir. 1965), cert. denied, 384 U. S. 921; United States v. Monjar, 147 F.2d 916 (3rd Cir. 1945, cert. denied, 65 S. Ct. 1191.

E. THE TRIAL COURT DID NOT COMMIT ERROR IN ITS RULING RE GRAND JURY TESTIMONY.

Appellant makes much of the fact that the testimony of one Grover Kreiger, one of the witnesses who appeared before the grand jury in connection with its investigation of this case, was not produced. It must be noted that Mr. Kreiger was never called as a witness either by the defendants or the Government during the trial of this case. Therefore, the Appellant's contention that the case of United States v. Youngblood, 379 F.2d 365 (2nd Cir. 1967) supports this allegation of "error" is completely unfounded. In Youngblood, the Second Circuit, in enunciating a prospective rule regarding production of transcripts of grand jury proceedings stated at page 370:

" . . . we direct that at trials commencing after our judgment here is entered, the District Courts of this circuit at the request of the defendant should order that the defendant be allowed to examine the grand jury testimony of those witnesses who testify at his trial without requiring him to show any particularized need for this material; we are holding that a defendant should be entitled to see all the grand jury testimony of each witness on the subjects about which that witness testified at the defendant's trial. " [Emphasis added].

Furthermore, at the time Appellant made a "request" (at a pre-trial conference) for Mr. Kreiger's grand jury testimony, the court informed Appellant and his co-defendant that in view of the Government's opposition, counsel would have to "make a motion and accompany said motion with an affidavit". Although Appellant's counsel said he would make such a motion, none was ever made [R. T. Vol. A 138, 139, 140].

F. APPELLANT'S ALLEGATIONS RE "THE COURT'S SPEEDING UP THE TRIAL."

Appellant contends that one of the factors the defense had to contend with during the trial was "the constant admonition of the trial judge, both directly and indirectly, to speed up the trial," and that this "was of great disadvantage to the defense." [Appellant's Brief pp. 55-56]. However, Appellant fails to show in any way the judge's remarks, the context in which they were made or why the rulings were error, much less prejudicial error requiring reversal. Appellant cites no cases to support his contentions. He merely makes reference to 13 places in the record, without further comment, which he requested that the court examine. Clearly, Appellant has failed to sustain his burden of demonstrating any error, let alone prejudicial error. Lake v. United States, 302 F.2d 452, 456 (8th Cir. 1962); Butler v. United States, 310 F.2d 214, 219 (9th Cir. 1962).

Even after examination of the references that Appellant points out, it is clear that there was no error in the proceedings and that Appellant's contentions are utterly without merit. The conduct of a trial is always a matter within the discretion of the trial judge, and no abuse of discretion is shown here. Roseman v. United States, 354 F.2d 18 (9th Cir. 1966).

It is well settled that when the record is examined for incidents of this alleged character, "questions and comments of the court must be read in their context and viewed with a

perspective of the whole proceedings. " Ochoa v. United States, 167 F.2d 341, 344 (9th Cir. 1948). Taking Appellant's references in the order that he lists them [Appellant's Brief p. 56], examination of the record discloses the following:

1. "R. T. 629, lines 1 and 2." Judge Hill made the remark: "We have just got to move this trial a little, gentlemen." Appellant fails to show or explain how this remark was in any way prejudicial to the substantive rights of Appellant, or was an abuse of discretion on the part of the trial judge. It is clear from the record that the remark was given for the benefit of all counsel involved in the trial, not directed to the defense, and was prompted by the fact that Mr. Maidman himself, counsel for Appellant, had delayed the process of the trial considerably by repeated efforts during his cross-examination to ask questions beyond the scope of direct examination [R. T. 577 through 579, 617, 618, 627, 628].

2. "R. T. 657, lines 17-25." At this point in the proceedings Mr. Maidman was continuing cross-examination of a Government witness. Appellee is unable to ascertain what incident took place here that could possibly have affected the substantial rights of Appellant, or that indicate an abuse of discretion on the part of the trial judge. Judge Hill said, "All right. Let's proceed gentlemen." [R. T. 657]. Surely Appellant is not claiming that this comment placed him at any disadvantage whatsoever. At this time Mr. Maidman had been reading into the record some questions and answers from a deposition in a civil case of Mr. Kavert. Judge Hill made a suggestion to Mr. Maidman, stating: "You know, you

could help us a great deal if you could give us everything in one document before you went to another document." Mr. Maidman answered: "I just had this down under a separate subject matter, your Honor." Judge Hill then stated: "All right." Again, Appellee cannot see what possible prejudice this remark had on the rights of Appellant.

3. "R. T. 659, line 6 through 661, line 5." At this point the court inquired of Mr. Maidman how many more books and extracts would be read into the record, since it was near the time for adjournment. Then the court announced that the evening adjournment would be taken and made a suggestion to all counsel that they try harder to organize their direct and cross-examination to keep on one subject matter at a time. At R. T. 661, lines 2-5, Judge Hill stated:

"But let the record be clear that I am not inhibiting your cross-examination in any respect. I am only pleading with you to organize your work for the maximum result of the time we have at our disposal."

There is nothing in these remarks that indicates the slightest evidence of any abuse of the trial court's wide discretion in conducting the trial.

4. "R. T. 725, line 15 through 726, line 4." At this point Mr. Maidman was conducting recross-examination of Government witness Kavert. There had been some procedural problems [R. T. 723, lines 3-10] involving recross-examination by both

counsel for the two defendants, and Judge Hill adopted a procedure whereby all cross-examination must be finished before redirect examination started. No objection was made to this ruling, and it is clearly within the judge's discretion to adopt methods of procedure which would help simplify the conduct of a trial.

5. "R. T. 740, lines 12-23." At this point Mr. Mattison, counsel for defendant Stanick, had completed cross-examination of a Government witness. The time was 12:00 noon. For his cross-examination, Mr. Maidman stated that he had "one question, your Honor or several. . . . It won't take more than five minutes." The court wanted to know precisely whether Mr. Maidman had one or several questions; if several, then the court would adjourn for the noontime recess. Mr. Maidman asked the judge for five minutes for cross-examination, whereupon the judge declared the noon recess. Appellee submits that there was no abuse of discretion on the part of the trial judge in calling a recess at 12:00 noon, the normal time for the noon recess, especially after a logical break in the proceedings, i. e., Mr. Mattison had finished his cross-examination. Appellee fails to understand how the granting of the noon recess at this time has any bearing on Appellant's contention that the judge speeded up the trial to the disadvantage of Appellant.

6. "R. T. 842, lines 15-19." At this point Mr. Maidman was cross-examining a Government witness. In reference to this cross-examination the court asked Mr. Maidman: "Are you proposing to take him through every day and every hour of the time he was there?" Appellee submits that it was within the court's discre-

tion in conducting this trial to ask such a question in order to prevent the possibility of totally irrelevant testimony being interjected into the record with the attendant delay in reaching the real issues of the case. In any event Mr. Maidman answered the question of the judge by stating, "No, your Honor." Mr. Maidman was then permitted to continue with his cross-examination [R. T. 842].

7. "R. T. 850, line 20 through 851, line 15." At this point Judge Hill commented that he was concerned with the amount of time the case was taking and advised Mr. Maidman, who had been cross-examining Government witness Dorr (one of the accountants with Ernst & Ernst), that

"I would certainly hope, Mr. Maidman, that we are not attempting to try the firm of Ernst & Ernst for any alleged negligence. That is not an issue before me, it seems to me. And if they were in some way at fault, that is not before me, as it would not excuse defendants' guilt, if they were guilty.

"So I would hope that you would agree with that analysis --

"MR. MAIDMAN: I do.

"THE COURT: -- and bear in mind that we are not here attempting to try any possible civil liability or other culpability of Ernst & Ernst; and hold the scope of questioning to the real issues of the case, . . .

"MR. MAIDMAN: I will try to keep that in mind, your Honor."

"THE COURT: Very well. We will see you after recess.

"Ten minutes. "

It is apparent that Mr. Maidman's cross-examination of Dorr was running far afield from the real issues in the case. Again Judge Hill was exercising his discretion in trying to keep the scope of the testimony away from obviously irrelevant issues. There was no intimidation on the part of the trial judge here or at any other point during this trial, and Mr. Maidman properly agreed with the court's analysis that this subject was irrelevant to the real issues of the case. See United States v. Danser, 26 F. R. D. 580, 586 (1959).

8. "R. T. 969, line 8 through 970, line 10." At this point, at the close of the afternoon session (when the Government indicated it would be resting its case shortly), the court indicated that it would be required to adjourn on the following day at 3:00 o'clock due to other matters on its calendar. The following comments were made by counsel for the co-defendant, Mr. Mattison:

"MR. MATTISON: Your Honor, I wonder whether it would be appropriate at this time to discuss the question of speeding up this trial? It's been lengthy, and will be lengthy. I wonder whether this would be an appropriate time to discuss it, if I may, briefly.

"THE COURT: I don't know what you have in mind. I like the sound of your objective.

"MR. MATTISON: I understand there will be no court the week of [July] 11th.

"THE COURT: That is the Ninth Circuit Judicial Conference.

"MR. MATTISON: When we reconvene again would it be possible for us to go an extra hour or so a day?

"THE COURT: Well, we shall see. I don't want to make any promises. I would hope that in that week you will have had a chance to carefully re-evaluate the Government's case and tailor your case to it, and to the substantial issues that may have been raised by you.

"MR. MAIDMAN: I assure you I shall do that, your Honor.

"THE COURT: It's unusual to have a week in which to consider the presentation of the defense case.

"I would also hope that there are matters that are susceptible of further stipulations between you and Government counsel. But that is entirely up to you.

"I am unable to comment much beyond that. I am anxious, after the week of the Judicial Conference, to move the case as much as can be done, within reasonable time limits. I have other cases on my calendar now that will start to pile up, if we do not end it within a reasonable time after we resume.

"So I am with you. Although I don't want to make any iron-clad promises of the length of time

that we will be working. I will appreciate anything you all can do to expedite the matter.

"Very well. We will see you in the morning.

9:45."

It is incomprehensible how Appellant can cite this as an example of the court "speeding up the trial."

9. "R. T. 1030, lines 12-18." At this point Mr. Maidman indicated that he wanted to make a motion to strike. The court asked him if it would take him any time to do this. Mr. Maidman replied, "no," that it would only take him about two minutes. The court replied, "All right." And Mr. Maidman made the motion.

10. "R. T. 1264, lines 6-8." At this point the court asked if defendants had come to any different conclusion about the length of their case, because, "I am trying to arrange my calendar." Clearly there is nothing in this statement that in any way places the Appellant at any disadvantage or is indicative of any intention to speed up the trial.

11. "R. T. 1831, lines 2-12." At this point the court inquired of Mr. Maidman as to how long it would take him to finish the direct examination of a witness. The court stated: "Well, I am just trying to do some planning. I have lawyers continually bombarding us for future trial dates."

12. "R. T. 2111, lines 5-8." At this point Mr. Maidman indicated to the court that he had three character witnesses on behalf of Appellant, "whom we would like to take out of order." Whereupon the court asked, "They will be brief, I take it?"

13. "R. T. 2287, lines 10-13." At this point the court remarked to Government counsel:

"Mr. Smaltz, I am somewhat disturbed at your announcement to me this morning that we had five more rebuttal witnesses. I surely hope that you are not piling things on cumulatively. This case has to end sometime."

How this statement can ever be characterized as directing the Appellant to "speed up his case" is beyond rational comprehension. The comment was directed to Government counsel and not Appellant. At no time during the trial did counsel for Appellant ever complain that he was being unduly hurried by the court. In fact, the co-defendant's counsel specifically indicated he wanted to move the case along more rapidly. Appellant has not demonstrated even a scintilla of fact in support of his contention and the 13 alleged indiscretions on the part of the trial court in the course of a non-jury trial that consumed over 2,500 pages of transcript. Considered individually, or in toto, there was no abuse on the part of the trial court in its discretion in conducting the proceedings. Butler v. United States, 310 F.2d 214, 217 (9th Cir. 1962). Rather, after a careful reading of the entire transcript it can only be concluded that the trial was conducted by a very learned judge who continually demonstrated that he was a pillar of patience and afforded defense counsel every indulgence possible.

G. THE TRIAL COURT DID NOT ERR IN ITS
RULINGS ON OBJECTIONS ADVERSE TO
THE DEFENSE.

Appellant complains in his brief (p. 56)," . . . the court erred on its rulings on objections adverse to the defense, we refrain from comment or argument in each item. We submit that the error of each ruling was harmful to defendant. "

Following this, Appellant then cites no less than seventeen references to the transcript where either the Government made an objection which was sustained, or Appellant's counsel, or the co-defendant's counsel made an objection which was overruled. No legal authorities are cited in support of Appellant's allegations that said rulings were "harmful to the defense" i. e., error, nor does Appellant explain how or why said rulings were harmful, neither in his brief, nor in the cited portion of the record of trial. In Lake v. United States, 302 F.2d 452 (8th Cir. 1962), the court stated with regard to this method of raising alleged error (at p. 456):

" . . . Appellant does not undertake to demonstrate any prejudice thereby other than to refer to such rulings en gross in his brief, without further comment. . . . Appellant has not demonstrated prejudicial error in respect to any of the foregoing matter. He has failed to sustain the burden cast upon him in that regard. (Myres v. United States, 174 F.2d 329 (8th Cir. 1949).)"

Under the circumstances of this case it can hardly be seriously contended that Appellee should reply to, or that the court should consider, issues which have neither been raised nor defined and which have no support in the record of trial. Cf. Butler v. United States, 310 F.2d 214, 219 (9th Cir. 1962).

H. "ALLEGED RESTRICTION ON CROSS-EXAMINATION."

Appellant argues that he was unduly restricted on his right to cross-examine certain witnesses and points to his efforts to examine Mr. Robert Follett regarding Mr. Clifford Shinn's (a Government witness) "lack of respect as to the taking of an oath and his atheistic leanings."

Appellant alleges:

"With this restriction it was impossible to go forward with the defense effort to prove that all of Shinn's 'sworn' testimony before the court . . . was a complete fabrication and inherently false."
[Appellant's Brief p. 54].

The precise questions which Appellant asked of Mr. Robert Follet, a defense witness, on direct examination, and the objections thereto, were as follows:

BY MR. MAIDMAN:

"Q May I ask you this: Have you ever been present during any times that Mr. Shinn referred to

other court proceedings in which he had taken an oath?

"A Yes, I have.

"MR. SMALTZ: Your Honor, I submit that we have not transcended the bounds --

"THE COURT: Yes. We are not getting reputation now. And if you want to impeach Shinn in connection with his question about atheism, you should have laid a foundation.

"MR. MAIDMAN: Your Honor, I don't intend to do that.

"THE COURT: The objection is sustained."

BY MR. MAIDMAN:

"Q Have you ever had any direct discussions with Mr. Shinn about his telling the truth or telling falsehoods in court proceedings?

"MR. SMALTZ: Your Honor, I submit that this is not proper.

"THE COURT: Sustained. If there is to be such, you should have laid a foundation with Shinn.

"Any further questions?

"MR. MAIDMAN: If I may be heard on this very briefly, your Honor --

"THE COURT: No, sir. You may proceed.

"MR. MAIDMAN: Nothing further." [R. T. 2319, 2320].

During Mr. Shinn's previous cross-examination he had

been asked only one question about his alleged "atheistic beliefs," which was:

BY MR. MATTISON:

"Q Are you an atheist, sir?

"A No, I am not.

"Q You are not?

"A No. [R. T. 2289].

From the above it is clear that no proper foundation -- in fact, no foundation whatsoever -- was laid with regard to Appellant's asking Mr. Follett these questions.

The law is settled that a sufficient foundation for prior inconsistent statements includes calling the attention of the witness being impeached to specific statements, so as to give an opportunity for explaining any inconsistency. In Burton v. United States, 175 F.2d 960, 965 (5th Cir. 1949), reh. denied, 176 F.2d 865, cert. denied, 338 U.S. 909, the court said:

"It is a well settled principle that a witness may not be discredited or his hostility and bias shown by proving statements made by him outside the court which do not harmonize with his statements on the witness stand, until his attention has been called specifically to the former statements, with particularity as to time, place and circumstance, so he can deny or explain them."

Cf. The Charles Morgan, 115 U.S. 69 (1884). Further, the scope allowed for this kind of examination, and the sufficiency of the

foundation, are largely matters of discretion with the trial court. As the court said in Samish v. United States, 223 F.2d 358, 364 (9th Cir. 1955), cert. denied, 350 U.S. 848:

"A trial judge in determining the sufficiency of a foundation necessarily must be permitted considerable latitude. (Citations)"

Accordingly, the court properly sustained Government counsel's objection and said rulings were not error.

VI

CONCLUSION

Although the trial was lengthy and the exhibits voluminous (there being in excess of 500), the record absolutely refutes Appellant's allegations concerning the erroneous rulings and misconduct of the trial judge. Rather, a careful review of the record establishes that this case was presided over by a very learned trial judge whose efforts at sifting and understanding the evidence were indefatigable. Throughout the entire trial the court's patience did not wane nor were any of its rulings in error. The evidence clearly established beyond a reasonable doubt Appellant's guilt

and for the reasons stated herein, it is respectfully submitted
that the judgment and sentence of the court should be affirmed.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.,
United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

DONALD C. SMALTZ,
Special Assistant to the
United States Attorney,
Central District,

Attorneys for Appellee,
United States of America

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Donald C. Smaltz

DONALD C. SMALTZ
Special Assistant to the
United States Attorney,
Central District

OPINION OF INDEPENDENT ACCOUNTANTS

Board of Directors

UNIVERSAL ECSCO CORPORATION

Downey, California

We have examined the statement of financial position of Universal Ecsco Corporation at August 31, 1960, its statement of income and retained-earnings deficit for the period of four months then ended, and the statement of income of its predecessor partnership for the period from April 14, 1958 (inception), to April 30, 1960. Our examination was made in accordance with generally accepted auditing standards, and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

In our opinion, subject to the outcome of the claims referred to in Note R to financial statements, the accompanying statement of financial position and statements of income and retained-earnings deficit present fairly the financial position of Universal Ecsco Corporation at August 31, 1960, and the results of operations of the Company and its predecessor partnership for the period from April 14, 1958, to August 31, 1960, and the summary of earnings (included elsewhere in this Prospectus) for the same period presents fairly the information therein, in conformity with generally accepted accounting principles applied on a consistent basis.

ERNST & ERNST

Los Angeles, California

October 24, 1960.

UNIVERSAL ESCO CORPORATION

STATEMENT OF FINANCIAL POSITION

ASSETS

	August 31, 1960	November 30, 1960 (Unaudited)
CURRENT ASSETS		
Cash	\$ 7,933	\$ 16,247
Amounts due on completed contracts	265,033	75,307
Due from factor upon realization of accounts (August 31, 1960— \$203,563; November 30, 1960—\$53,815) assigned to it.....	40,712	15,333
Due from subcontractor—Note S	L 172,473	213,984
Contracts in process—Note M	544,610	277,235 649,372
Less progress payments received	22,559	46,525
	\$ 522,051	\$ 602,847
Prepaid expenses	9,452	8,768
TOTAL CURRENT ASSETS	\$ 845,181	\$ 932,486
OTHER ASSETS		
Due from officers (shareholders)	\$ 4,737	\$ 7,248
Sundry deposits, advances, etc.	4,836	3,923
TOTAL OTHER ASSETS	\$ 9,573	\$ 11,171
PROPERTY, PLANT, AND EQUIPMENT—on the basis of cost—Note N		
Building and improvements	\$ 39,325	\$ 39,325
Machinery and other equipment	136,968	139,200
	\$ 176,293	\$ 178,525
Less allowances for depreciation	15,156	20,692
	\$ 161,137	\$ 157,833
Land	17,349	17,349
TOTAL PROPERTY, PLANT, AND EQUIPMENT	\$ 178,486	\$ 175,182
DEFERRED CHARGES		
Unamortized excess of liabilities over assets of predecessor partnership —Note O	\$ 70,041	\$ 66,289
Engineering and proposal costs—Note P	27,185	62,603
TOTAL DEFERRED CHARGES	\$ 97,226	\$ 128,892
	\$1,130,466	\$1,247,731
	L 758,329	875,594

See notes to financial statements.

UNIVERSAL ECSCO CORPORATION

STATEMENT OF FINANCIAL POSITION

LIABILITIES

	August 31, 1960	November 30, 1960 (Unaudited)
CURRENT LIABILITIES		
Note payable to bank—unsecured	\$	\$ 200,000
Trade accounts payable	700,268	517,256
Bank checks outstanding, less cash on deposit (\$30,816) as reported by bank	49,817	
Equipment purchase contracts, secured by equipment (August 31, 1960—\$84,206; November 30, 1960—\$86,250)	35,044	32,024
Salaries and wages, pay roll taxes, and amounts withheld from employees—Note Q	143,010	118,600
Taxes, other than pay roll taxes and taxes on income	2,331	
Current maturities on long-term debt	2,513	2,672
TOTAL CURRENT LIABILITIES	\$ 932,983	\$ 870,552
DUE TO PARENT COMPANY		325,000
LONG-TERM DEBT—less current maturities—Note N	224,477	223,834
TOTAL LIABILITIES	\$1,157,460	\$1,419,386

DEFICIENCY IN ASSETS

CAPITAL STOCK

Preferred Stock, par value \$10 a share:

Authorized—20,000 shares; issued—none

Common Stock, par value \$1 a share:

Authorized—1,500,000 shares; issued and outstanding 331,000
shares—Notes N and R

\$ 331,000 \$ 331,000

Less excess over net assets of predecessor partnership of par value of
Common Stock issued therefor

331,000 331,000

	L	\$ (399,131)	\$ (543,792)
RETAINED-EARNINGS DEFICIT (deduction)		(26,994)	(171,655)
TOTAL DEFICIENCY IN ASSETS		\$ (26,994)	\$ (171,655)
		4 (399,131)	(543,792)

CONTINGENT LIABILITIES—Notes Q and S

\$1,130,466 \$1,247,731

See notes to financial statements.

UNIVERSAL ECSCO CORPORATION

STATEMENT OF INCOME AND RETAINED-EARNINGS DEFICIT

Period of four months ended August 31, 1960, and

Period of seven months ended November 30, 1960

AND

ECSCO (A PARTNERSHIP)

STATEMENT OF INCOME

Period from April 14, 1958 to April 30, 1960

	ECSCO (A Partnership)			Universal EcSCO Corporation	
	April 14, 1958, to December 31, 1958	Year ended December 31, 1959	Period of four months ended April 30, 1960	Period of four months ended August 31, 1960	Period of seven months ended November 30, 1960 (Unaudited)
Net sales of completed con- tracts	\$ 5,613	\$551,670	\$191,805	\$1,829,042	\$1,898,557
Costs and expenses:					
Cost of completed con- tracts—Note M	\$27,974	\$549,620	\$259,045	^{L1} 2,188,384 \$1,816,247	\$2,012,010
Amortization of organi- zation expense				5,003	8,755
Interest on long-term debt		278	603	3,779	7,030
Other interest	49	2,941	16,090	31,007	42,417
	<u>\$28,023</u>	<u>\$552,839</u>	<u>\$275,738</u>	<u>\$1,856,036</u>	<u>\$2,070,212</u>
Net loss	<u>\$22,410</u>	<u>\$ 1,169</u>	<u>\$ 83,933</u>		
		^{L3} \$ 130,604			
Net loss for period and retained-earn- ings deficit at end of period				^{L2} 399,131 \$ 26,994	\$ 171,655

See notes to financial statements.

UNIVERSAL ECSCO CORPORATION AND PREDECESSOR PARTNERSHIP

NOTES TO FINANCIAL STATEMENTS

(Insofar as applicable to dates and periods subsequent to August 31, 1960, these notes are not covered by the report of independent accountants.)

NOTE M—CONTRACTS IN PROCESS

Contracts in process are stated on the basis of accumulated costs, but not in excess of estimated recoverable amounts. The Company has followed a method of accounting whereby no income is reported on any contract until the contract is substantially complete. Under such method of accounting, all costs including administrative and general expenses are considered as contract costs and are allocated to contracts in process as incurred.

NOTE N—LONG-TERM DEBT

Long-term debt consists of the following:

	August 31, 1960		November 30, 1960	
	Current Maturities	Due After One Year	Current Maturities	Due After One Year
6% Five Year Convertible Debentures....	\$ —	\$200,000	\$ —	\$200,000
Trust deed note payable, secured by land and building, payable \$250 monthly including interest at 6%	1,650	21,602	1,809	21,175
Trust deed note payable, secured by improvements, payable \$72 monthly including interest at 5%	863	2,875	863	2,659
	<u>\$2,513</u>	<u>\$224,477</u>	<u>\$2,672</u>	<u>\$223,834</u>

The 6% Five Year Convertible Debentures were issued in two series of \$100,000 maturing April 28, 1965, and June 14, 1965, respectively. The Debentures are convertible into Common Stock at the price of \$2 a share. Such conversion price is subject to downward adjustment should the Company (a) issue, or agree to issue under options or rights, shares of Common Stock for less than the conversion price in effect immediately prior to the time of such issue, or (b) issue Common Stock in subdivision of outstanding Common Stock. At August 31, 1960, and November 30, 1960, 100,000 shares of Common Stock were reserved for conversion, based upon the initial conversion price. Under terms of the Debentures, the Company may not pay cash dividends as long as any of the Debentures remain outstanding. Reference is made to Note B to statement of financial position of Shinn Industries, Inc.

NOTE O—EXCESS OF LIABILITIES OVER ASSETS OF PREDECESSOR PARTNERSHIP

The Company was incorporated on April 22, 1960, and commenced operations on May 1, 1960, when it acquired the assets and assumed the liabilities of Ecsco (a partnership) in consideration of the issuance of 331,000 shares of its Common Stock. Liabilities assumed exceeded assets acquired by \$75,044. Such amount has been capitalized, and is being amortized over a period of sixty months.

NOTE P—ENGINEERING AND PROPOSAL COSTS

Engineering and proposal costs represent costs (\$23,650 at August 31, 1960; \$63,068 at November 30, 1960) attributable to the development of eight new products and costs (\$3,535) incurred relating to the submission of a bid proposal. The engineering costs on new products will be amortized over a period not exceeding sixty months, and proposal costs will be charged as cost of future contracts.

NOTE Q—DELINQUENT PAY ROLL TAXES

At August 31, 1960, and November 30, 1960, the Company was delinquent in the payment of pay roll taxes and withholding taxes in the amounts of \$58,909 and \$83,835, respectively. Provision has

UNIVERSAL ECSCO CORPORATION AND PREDECESSOR PARTNERSHIP

NOTES TO FINANCIAL STATEMENTS—(Continued)

been made for related interest on such delinquency. The Internal Revenue Code of 1954 provides for various penalties in case of delinquencies in payment, the most severe of which is 100% of the delinquent tax. The Company does not believe that any such penalties will be imposed.

NOTE R—COMMON STOCK

All outstanding shares of Common Stock have been deposited in escrow and may not be sold or transferred without the written consent of the Commissioner of Corporations, State of California.

NOTE S—CONTINGENT LIABILITIES

Subsequent to August 31, 1960, the Company incurred costs (\$213,984 at November 30, 1960; \$279,430 at January 31, 1961) in order to assure completion of a subcontract. Pursuant to an agreement with the subcontractor, relating to these costs, the Company is to be reimbursed for such funds expended. It is the opinion of management and legal counsel that such costs will be recovered from the subcontractor.

The Company has been billed by such subcontractor for additional amounts (\$132,293 at August 31, 1960, \$226,914 at November 30, 1960 and \$241,217 at January 31, 1961) expended by him in excess of amounts authorized under terms of the applicable contract. In addition, an unrelated claim based on alleged breach of contract has been made against the Company by a vendor in the sum of \$20,589. No provision for such amounts has been made in the accompanying financial statements as it is the opinion of management and legal counsel that there is no basis for the claims.

The Company is also contingently liable to the extent of advances made (approximately \$160,000 at August 31, 1960, and \$40,000 at November 30, 1960) on unpaid balances of accounts assigned to a factor.

NOTE T—POLICY RELATIVE TO DEPRECIATION, ETC.

Depreciation of property, plant, and equipment was provided for in amounts sufficient to amortize the cost of depreciable assets over their useful lives. Estimated useful lives were as follows:

	<u>Range</u>
Building and improvements	20 years
Machinery and other equipment	4 to 10 years

Depreciation rates based upon the aforementioned lives were applied by the straight line method.

Maintenance and repairs were charged against operations. Renewals and betterments were capitalized.

When assets are disposed of, allowances for depreciation will be charged with the accumulated depreciation and the resulting profits and losses will be transferred to the income account, or, in the case of a trade, to adjust the cost of the acquired assets.

NOTE U—SUPPLEMENTARY PROFIT AND LOSS INFORMATION

The following tabulation sets forth the amounts of certain classes of expenses incurred during the period:

	<u>Charged Directly to Cost of Products and Services Sold</u>
From April 14, 1958, to December 31, 1958:	
Maintenance and repairs	\$ 179
Depreciation	952
Taxes, other than taxes on income:	
Pay roll taxes	178
Other taxes and licenses	21
Rents	2,225

UNIVERSAL ECSCO CORPORATION AND PREDECESSOR PARTNERSHIP

NOTES TO FINANCIAL STATEMENTS—(Continued)

Charged Directly
to Cost of
Products and
Services Sold

NOTE U—SUPPLEMENTARY PROFIT AND LOSS INFORMATION—(Continued)

Year ended December 31, 1959:

Maintenance and repairs	\$ 1,128
Depreciation	1,146

Taxes, other than taxes on income:

Pay roll taxes	10,858
Local property taxes	526
Other taxes and licenses	321
Rents (including equipment rentals)	7,901

Period of four months ended April 30, 1960:

Maintenance and repairs	2,417
Depreciation	6,061

Taxes, other than taxes on income:

Pay roll taxes	17,361
Other taxes and licenses	103
Rents (including equipment rentals)	9,624

Period of four months ended August 31, 1960:

Maintenance and repairs	2,084
Depreciation	6,997

Taxes, other than taxes on income:

Pay roll taxes	19,796
State franchise tax	100
Local property taxes	388
Other taxes and licenses	145
Rents (including equipment rentals)	14,662

Period of seven months ended November 30, 1960 (Unaudited):

Maintenance and repairs	3,354
Depreciation	12,533

Taxes, other than taxes on income:

Pay roll taxes	26,233
State franchise tax	100
Local property taxes	971
Other taxes and licenses	4,464
Rents (including equipment rentals)	21,371

There were no management and service contract fees or royalties incurred during the period.

APPENDIX B

COMMENTS OF TRIAL JUDGE AT CONCLUSION OF TRIAL

Findings of fact in this case have been voluntarily waived. The remarks which I am going to make will not be construed as findings of fact but as comments of mine on the case. They are extemporaneous and informal and not intended to be comprehensive.

The case took a long time to try, but the decision of it gets down to a few relatively simple issues.

First, were false and misleading financial statements prepared for the periods mentioned in the indictment?

Second, if so, as to each defendant, did he cause them to be prepared and know they were false and misleading?

Third, if the foregoing is answered in the affirmative, did each defendant, with particular reference to Counts Two, Three and Four, knowingly and wilfully cause the false and misleading financial statements to be filed with the SEC for the purpose of offering securities of Shinn Industries, Inc. to the public?

Fourth, as to Count One, did the defendants conspire to defraud the United States by impeding and obstructing the lawful function of the SEC and conspire to commit all or any of the other substantive offenses charged in Count One?

Applying the requirement that each element of the crimes charged must be proved beyond a reasonable doubt, I

have determined that all of these questions can and must be answered in the affirmative as to each defendant.

It is abundantly clear that the financial statements for the year ending December 31, 1959, and for the four months period ending August 31, 1960, were false, misleading and fraudulent. Each substantially overstated the results of the company's operations for the period covered. Each showed a loss, but if the true facts had been reflected, a very much larger loss would have been shown in each case.

For the year end 1959, if the true facts had been reflected, the loss would not have been the small amount of eleven hundred-odd dollars as shown in the Registration Statement, but in the neighborhood of \$130,000 or more. For the four months ended August 31, 1960, if the true facts had been reflected, the loss would have been not the twenty-six thousand nine hundred odd dollars as shown in the Registration Statement, but almost \$400,000.

These overstatements of results, or to put it the other way, these substantial understatements of losses were accomplished by false and fraudulent means. For the year ending 1959 it was accomplished by purported cancellation of a very large account payable to a creditor, Condeco, accompanied by phony and false credit memoranda which the creditor never saw and which were prepared in defendants' offices -- that is, never saw before preparation. The creditor was given other sources for payment later. The loss was thus not reflected in the period in

which it was incurred and was pushed over to a later accounting period. The defendants knew, as I see this case, that their financial statement for the period was thus rendered false and misleading.

The Kansas City job accounted for the overwhelming part of the business done during that period. The defendants knew that they had incurred a whopping loss, well in excess of \$100,000, on Kansas City, but nevertheless permitted the accounting statements to be issued and to be used as part of the later Registration Statement, showing a loss of only eleven hundred-odd dollars.

For the four months ending August 31, 1960, the overstatement of results was accomplished by a reallocation of costs of over \$300,000 incurred for the Philadelphia Post Office job, to three new and uncompleted jobs, New Orleans, Houston and Portland. This result was achieved by substituting new pages in the books of account, by changing column headings, by adding new allocation figures and other false and fraudulent methods.

I have no doubt from the evidence presented to me that the defendants instructed and directed that this be done. It may be that they did not see the individual altered entries, the precise new figures, and so forth. But that is really immaterial. The defendants were interested only in the total result, and that is that the great losses they knew had been incurred on Philadelphia be vastly minimized so that the results of operations as reflected

in the accounting statements for the period would present as favorable a picture as possible.

Defendants knew that the Philadelphia contract had turned out to be a fiasco. They knew that their business was on the rocks and the only possible way it could be kept alive and perhaps salvaged was by a massive infusion of equity capital from public financing. They knew that would be impossible if the true losses were shown.

Now, true, the method they directed for obscuring the facts did not succeed in hiding the losses forever. The losses were only transferred to later periods. But by that time, they figured that the public financing would be completed. They may each have hoped and expected that the new Post Office contracts would be very profitable and so that the losses previously incurred could be made up by profits from the new jobs. But that is not material. In their desperation to hide their true financial picture, they knowingly and intentionally took the risk of causing to be prepared, circulated and published, false financial statements for the periods involved.

Now, defendants point to the fact that other various people had advanced substantial funds to the business and thus their situation was not as desperate as the Government painted. This argument is not convincing. All of these other funds were short-term and/or in contemplation of the public financing. If the public financing fell through, the defendants were well aware that all was lost and they were willing to go and did go to

any lengths to get it through.

Defendants have contended in the trial that the year end 1959 statement was not prepared and the Condecoco reversal of the account payable was not done, with any view of obtaining public financing and thus, they argue, cannot be considered as evidence of crimes charged against them.

First, this contention is, in my view, not factually correct. I am convinced that they well knew at that time the necessity of public financing and contemplated it; that is, at the time when the acts were done and the financial statement prepared.

But even if the contention is factually correct, it avails them nothing. One can prepare a false financial statement for another purpose unrelated to public financing in the Registration Statement, but if he presents and publishes it as a part of a Registration Statement later on, knowing it to be false, it is evidence of the commission of the substantive offenses as charged here.

I think I ought to say a word about the so-called "claims issue." Defendants have argued, in effect, that the financial statement for August 31, 1960, wasn't really false because they had a claim against the Post Office Department for breach of contract which would have made up for the over \$300,000 of Philadelphia costs falsely reallocated to other jobs. That is not, in my view, a persuasive argument. They may have believed that the Post Office Department had breached its contract in various

ways. But a potential claim, of uncertain amount and uncertain recovery, which could not have been presented or even compiled on August 31, 1960, clearly is not and was not an asset, as of August 31st, under good accounting practices. This claim argument is probably an after-thought on the part of defendants to escape the criminal onus of their wilful falsifications. It certainly does not constitute a defense.

The evidence demonstrates the guilt of both defendants. They were equal partners with equal control and equal responsibility in the business. Decisions were equally shared. The instructions to manipulate the books may have been uttered by one, but in the presence of the other, and surely with the other's full knowledge, participation and concurrence. The conspiracy between them has been proved, as well as their joint culpability in each of the substantive counts.

One more word. I have carefully observed the demeanor of each witness and analyzed the testimony of each in terms of whether it is corroborated or contradicted by the testimony of other witnesses.

I believe the testimony of Mr. Kavert and that of the other Government witnesses which corroborate his testimony in various ways. I did not believe the defendants as to the important facets of their testimony. They attempted to give the impression in this case that they knew nothing of accounting, knew nothing of profits or losses, never relied on their accounting department or personnel, didn't understand financial statements,

including the net loss figures shown.

These gentlemen owned the business. Everything they had was at stake. But to hear them tell it, one would believe that their interest in their own accounting department was confined to saying, "Good morning. " They would have us believe that they didn't know what was going on and didn't want to know; that the accounting department was operating in kind of a vacuum without control or direction, that the accounting department turned out figures and financial statements were then prepared based on the figures which the defendants accepted without really looking at them.

Along this same line, defendants appear to be saying that outside accounts were employed, and if these outside accounts said the financial statements were right, they, as owners, were relying on the outside accounts and their figures, and whatever happened is all the outside accounts fault. This posture and position defies rational belief and is not in accordance with the known facts.

[Reporter's Transcript of Proceedings, p. 2542, line 6, through p. 2549, line 24.]

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RUSSEL MILTON WILLS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

NO. 2 1 3 7 8

BRIEF OF APPELLEE

Appeal from the United States District Court
for the Western District of Washington
Northern Division
Honorable William T. Beeks
District Judge

FILED

JUN 20 1967

WM. B. LUCK, CLERK

EUGENE G. CUSHING
United States Attorney

MICHAEL J. SWOFFORD
Assistant United States Attorney

JUL 3 1967

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STATEMENT OF JURISDICTION¹

Appellant, Russel Milton Wills, was charged in the following one-count Indictment with refusing to be inducted into the Armed Forces of the United States on or about February 24, 1966 (R1):

"The Grand Jury charges:

That on or about February 24, 1966, at Seattle, Washington within the Northern Division of the Western District of Washington, RUSSEL MILTON WILLS did knowingly, wilfully and unlawfully fail, neglect and refuse to perform a duty required of him by the Universal Military Training and Service Act, and the rules, regulations and directions made pursuant thereto, in that, having been duly and regularly ordered by a local Selective Service Board to report and submit to induction into the Armed Forces of the United States of America, he failed, neglected and refused to be inducted.

All in violation of Title 50 U.S.C., App. Section 462, and 32 C.F.R. 1632.14."

Appellant entered a plea of "not guilty" on August 5, 1966 (R2-R4), waived trial by jury (R6) and was tried by the Court on September 12, 1966 (TR). The Court took the case under advisement and announced a decision of "guilty" on September 23, 1966, in a Memorandum Decision (R14). Appellant was sentenced to five years imprisonment on September 23, 1966,

¹/In this brief, (R) will refer to the number of the records herein given by the Clerk of the Court for the Western District of Washington. (TR) will refer to the Court Reporter's transcript of proceedings. (EX) will refer to exhibits.

1 with the recommendation that he not be eligible for parole
2 until such time as he had served two years of the sentence.
3 A notice of appeal was also filed on September 23, 1966.
4

5 Jurisdiction of the District Court was based on
6 Title 18, U.S.C., Section 3231. This Court has jurisdiction
7 of the appeal under Title 28, U.S.C., Section 1291.

8 COUNTERSTATEMENT OF THE CASE

9 The exhibits admitted into evidence at the trial
10 established that the appellant was ordered by Transfer Board
11 No. 3, Seattle, Washington, on February 15, 1966, to report
12 for induction on February 24, 1966. Appellant reported to
13 the Induction Station in Seattle on February 24, 1966, but
14 refused to be inducted into the Armed Forces. At that time
15 he signed a witnessed statement as follows:

16 "I refuse to be inducted into the Armed Forces
17 of the United States."

18 /s/ Russel Milton Wills

19 The following summary of events leading up to appellant's
20 refusal to be inducted is presented in chronological order
21 for the Court's convenience:

22 October 15, 1965: Registrant sent a letter to his draft
23 board, Local Board No. 47, Berkeley, California, in
24 which he advised said board that he had intentionally
25 destroyed his draft card and would henceforth refuse

1 to carry another. He further advised the Board that
2 he would refuse to cooperate with them in any manner
3 whatsoever (EX1, p.23)

4 October 21, 1965: Appellant was declared a delinquent and
5 was reclassified I-A (EX 1 - Cover Sheet).

6 October 23, 1965: Local Board 47 sent appellant SSS Form 110
7 which advised him of his I-A classification. He was
8 also advised by said form of his right to a personal
9 appearance before the local board, of his right to
10 appeal his classification to an appeal board, of his
11 right to a Presidential appeal, and of his right to
12 seek information or advice from any local board (EX 2)

13 December 27, 1965: The State Director of Selective Service,
14 State of California, advised Local Board No. 47,
15 Berkeley, California, that the registrant should be
16 ordered for induction as a delinquent (EX 1, p.28).

17 January 3, 1966: Local Board No. 47, Berkeley, California
18 sent a delinquency notice to the registrant (EX1, p.29).

19 January 5, 1966: Registrant acknowledged receipt of the
20 delinquency notice mailed on January 3, 1966 (EX 1, p.32)

21 January 31, 1966: Local Board No. 47, Berkeley, California,
22 mailed to the registrant an order to report for induction,
23 directing that he report for induction on February 16,
24 1966, at the Armed Forces Examining and Entrance
25 Station, Oakland, California. (EX 1, p.57)

1 February 3, 1966: Registrant mailed a letter to Local Board
2 No. 47, Berkeley, California, in which he acknowledged
3 receipt of his order to report for induction.

4 (EX 1, p.36-38)

5 February 7, 1966: Registrant appeared at Transfer Board No. 3,
6 Seattle, Washington, and requested to be transferred to
7 that Board for the purpose of reporting for induction
8 on a date to be set by Transfer Board No. 3, Seattle,
9 Washington. His request was approved by Transfer Board
10 No. 3 and he was in fact transferred from Local Board
11 No. 47, Berkeley, California, to Transfer Board No. 3,
12 Seattle, Washington, on February 10, 1966, for
13 induction. (EX 1, p.55)

14 February 15, 1966: Transfer Board No. 3, Seattle, Washington,
15 mailed to registrant an Order For Transferred Man To
16 Report For Induction, directing that he report for
17 induction on February 24, 1966, at the Armed Forces
18 Examining and Induction Station, Seattle, Washington.

19 February 24, 1966: Registrant reported to the Armed Forces
20 Examining and Entrance Station, Seattle, Washington, but
21 refused to be inducted into the Armed Forces of the
22 United States. At that time he signed a statement as
23 follows: "I refuse to be inducted into the Armed Forces
24 of the United States--signed Russel Milton Wills"
25 (EX 1, p.58 through 61).

QUESTIONS PRESENTED

1. Whether Local Board No. 47 properly declared appellant to be a delinquent:
 - (a) Whether a Local Board can declare a registrant delinquent for non-possession of his draft card.
 - (b) Whether the reason stated for appellant's delinquency (Destroyed his Registration Certificate) includes the offense of non-possession of a draft card.
 - (c) Whether appellant's constitutional rights to self-expression and to petition his Government were infringed by the Local Board's action in declaring appellant delinquent.
2. Whether the constitutionality of Public Law 89-152 is an issue in this case, and, if so, whether said law is constitutional.
3. Whether appellant was denied procedural rights to a personal appearance before the Local Board and to an appeal:
 - (a) Whether the lateness of the Local Board in sending appellant a Delinquency Notice deprived him of any procedural rights.

1 (b) Whether appellant already knew the reason for his
2 reclassification.

3 (c) Whether appellant failed to exhaust his administra-
4 tive remedies.

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7 SUMMARY OF ARGUMENT

8 1. The action taken by Local Board No. 47 in declaring
9 appellant to be delinquent was in accordance with existing
10 Selective Service regulations.

11 a. A Local Board can declare a registrant
12 delinquent for non-possession of his draft
13 card.

14 b. The reason stated for appellant's delinquency
15 necessarily includes the offense of non-
16 possession of a draft card.

17 c. Appellant's constitutional rights to self-
18 expression and to petition his Government were
19 not infringed by the Local Board's action of
20 declaring appellant delinquent for non-posses-
21 sion of his draft card.

22 2. The constitutionality of Public Law 89-152 is not
23 an issue in this case because the Indictment did not charge
24 appellant for a violation of said statute. Public Law
25 89-152 is nevertheless constitutional.

1 3. Appellant was not denied any procedural rights to
2 a personal appearance before the Local Board or to an appeal.

3 a. The lateness of the Local Board in sending
4 appellant a Delinquency Notice did not deprive
5 him of any procedural rights because he
6 already knew the reason for his reclassifica-
7 tion and because a Delinquency Notice by itself
8 does not entitle a registrant to a personal
9 appearance or to an appeal.

10 b. Appellant was advised of his procedural rights
11 to a personal appearance and to an appeal two
12 days after he had been declared delinquent
13 and reclassified I-A.
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1 ARGUMENT

2 I & V

3 THE LOCAL BOARD'S ACTION DECLARING
4 APPELLANT DELINQUENT WAS PROPER

5 Both Points I and V of Appellant's Opening Brief relate
6 to Local Board No. 47's action in declaring appellant a
7 delinquent, and since both arguments involve related points
8 of law, they will be treated together in this brief.

9 On October 15, 1965, appellant wrote the following
10 letter to Local Board No. 47 in Berkeley, California:

11 Local Draft Board
12 Bancroft Way
13 Berkeley, Calif.

14 Gentlemen:

15 This is to inform your office that 1, I have
16 intentionally destroyed by draft card and will
17 henceforth refuse to carry another. 2, I have
18 signed the C.N.V.A. petition, with which I
19 am sure you are familiar. 3, I will refuse to
20 co-operate with your office in any manner what-
21 soever. If you wish to take any measures
22 against me, you can contact me at the following
23 address...

24 Respectfully,
25 /s/ Russel M. Wills
Russel Milton Wills

26 On October 21, 1965, Local Board No. 47 declared appellant to
27 be a delinquent and made the following entry on his Selective
28 Service Cover Sheet: "Destroyed reg. card." Appellant con-
29 tends that a Draft Board cannot make a registrant delinquent
30 for a "strongly-worded letter" because such action would

1 penalize peaceful expression of unpopular views and would
2 further abridge registrant's right to petition the Government.

3 Strongly-worded letter, standing by themselves, are not
4 a basis for a delinquency declaration. However, when the
5 letter has the registrant's signature affixed thereto and
6 states that the registrant has intentionally destroyed his
7 draft card, the letter is conclusive evidence that the
8 registrant does not have his draft card in his possession.

9 32 C.F.R. 1642 sets forth the circumstances under which
10 a registrant can be declared a delinquent. 32 C.F.R. Section
11 1642.4 states as follows:

12 (a) Whenever a registrant has failed to perform
13 any duty or duties required of him under the
14 Selective Service law other than the duty to
15 comply with an order to report for induction,
or the duty to comply with an order to report
for civilian work..., the Local Board may
declare him to be a delinquent.

16 One of the duties required under Selective Service law is for
17 a registrant to have in his possession at all times a
18 Selective Service Registration Certificate. This is spelled
19 out in 32 C.F.R. Section 1617.1 which provides as follows:

20 Every person required to present himself for
21 and submit to registration must, after he has
22 registered, have in his personal possession
23 at all times his Registration Certificate
(SSS Form No. 2) prepared by his Local Board
24 which has not been altered and on which no
notation duly and validly inscribed thereon has
been changed in any manner after its preparation
by the Local Board...

25 The reasonableness and validity of this regulation has been

1 affirmed in United States v. Kime, 188 F.2d 677 (7th Cir. 1951)
2 cert. den. 342 U.S. 823; United States v. Hertlein, 143 F.Supp.
3 746 (E.D. Wis. 1956); and O'Brien v. United States, _____ F.2d
4 _____ (1st Cir. April 10, 1967). The reasons for requiring a
5 registrant to have his Selective Service Registration
6 Certificate in his possession at all times are well stated
7 in United States v. Miller, 367 F.2d 72, 79 (2nd Cir. 1966)
8 cert. den. _____, and are summarized as follows:

- 9 1. Certificate serves as proof of registration
10 and contains complet information as to the
11 registrant's classification;
- 12 2. In time of war or national emergency, it pro-
13 vides an instant means in a transient society
14 of determining a registrant's fitness for
15 immediate induction, if exigencies require it;
- 16 3. The Certificate can assist a Local Board to
17 reconstruct files destroyed by fire or
18 disaster;
- 19 4. The Certificate carries a continuing reminder
20 to a registrant to notify his Board of facts
21 which might change his classification; and
- 22 5. The Certificate facilitates personal inquiries
23 to a Local Board.

24 Since Miller intentionally destroyed his draft card as
25 indicated in the October 15, 1965, letter, it follows that he
would not have the card in his possession and would thereby
fail to fulfill the duty set forth in 32 C.F.R. Section 1617.1.
Hence, the Local Board could properly declare him to be a
delinquent for failure to perform a duty required of him, in
accordance with 32 C.F.R. Section 1642.4. Once a registrant

1 has been declared delinquent, his Local Board may then
2 reclassify him to Class I-A in accordance with 32 C.F.R.
3 Section 1642.12 which reads in part as follows:

4 Any delinquent registrant between the ages
5 of 18 years and 6 months and 26 years...
6 may be classified in or reclassified into
7 Class I-A or Class I-AO, whichever is appli-
 cable, regardless of other circumstances...
 (Emphasis supplied).

8 Hence, Local Board No. 47 had the authority to declare
9 appellant delinquent and to reclassify him I-A and the Board
10 followed the provision of the Selective Service regulations
11 cited above when it took this action on October 21, 1965.

12 Appellant contends in Point V of his Opening Brief that
13 no statute or regulation authorizes a Local Draft Board to
14 declare a registrant delinquent for the reason that he
15 "destroyed his Registration Certificate." It should be noted
16 that a "Notice of Delinquency" by a Local Board does not make
17 a man delinquent. He is delinquent because of an act he
18 performs or fails to perform and not because of any determina-
19 tion by the Selective Service Board. Hence, Wills was
20 delinquent at the moment he failed to have his Registration
21 Certificate in his possession. The Notice of Delinquency
22 prepared by a Local Board is fundamentally a part of the
23 classification process and, in this case, the Notice of
24 Delinquency document was merely an official recordation in
25 appellant's file of a status into which he had already placed

1 himself the moment he failed to have his Registration
2 Certificate in his possession.

3 The Notice of Delinquency states that the reason for
4 the delinquency is that Wills "destroyed his Registration
5 Certificate" (EX 1, p.29). These words and this reason
6 necessarily include the fact that he did not have his Regis-
7 tration Certificate in his possession, because it would be
8 impossible for a person to have in his possession something
9 which he had recently destroyed. Therefore, the Board's
10 authority for declaring Wills delinquent was the non-posses-
11 sion of this draft card (32 C.F.R. 1617.1). When preparing
12 the Notice of Delinquency, the Board set forth therein
13 reason for Wills not having the card in his possession
14 ("destroyed his Registration Certificate") rather than the
15 fact of non-possession. In brief, the words "destroyed his
16 Registration Certificate" include the fact that he no longer
17 possessed the Certificate.

18 Rule 31(c) of the Federal Rules of Criminal Procedure
19 provides:

20 The defendant may be found guilty of an offense
21 necessarily included in the offense charged...
22 (Emphasis supplied).

23 The case of O'Brien v. United States, _____ F.2d _____
24 (1st Cir. April 10, 1967) is directly in point. The defen-
25 dant was charged in a one count Indictment for wilfully and
knowingly mutilating, destroying and changing by burning his

1 registration certificate (SSS Form No. 2) in violation of
2 Title 50 U.S.C.A., Section 462(b)(3). The Indictment did not
3 contain a charge that the defendant failed to have his draft
4 card in his possession (a violation of 50 U.S.C.App.462(b)(6)).
5 The Circuit Court held that Public Law 89-152 (50 U.S.C.A.
6 462(b)(3) which makes it a crime to knowingly destroy or
7 mutilate a draft card, was unconstitutional, but nevertheless
8 affirmed O'Brien's conviction on grounds that he failed to
9 have his draft card in his possession. Even though O'Brien
10 was not charge with non-possession of his draft card in the
11 Indictment, the Court reasoned that the offense of non-posses-
12 sion was included in the offense of wilfull destruction. The
13 Court stated:

14 In burning his Certificate he not only contra-
15 vened subsection (b)(3), but also subsection
(b)(6).

16 Subsection (b)(6) of 50 U.S.C.A. 462 is the provision which
17 authorized prosecution for non-possession of a Certificate.

18 The Court in O'Brien, supra, also dealt with the same
19 constitutional allegations set forth in appellant's brief
20 herein and ruled that there is no constitutional objection to
21 conviction for non-possession of the Certificate. As stated
22 by the Court at page 5 of the Opinion:

23 Nor do we see any constitutional objection to
24 conviction for non-possession of a Certificate.
25 It is one thing to say that a requirement that
has no reasonable basis may infringe upon free
speech. Different considerations arise when

1 the statute has a proper purpose and the
2 defendant merely invokes free speech as a
reason for breaking it.

3 In summary, the law is clear that the offense of non-
4 possession of a draft card is included within the offense of
5 wilfull destruction of said card. The law is also clear that
6 a registrant's constitutional rights are not infringed when
7 he is convicted for non-possession of a draft card. Accord-
8 ingly, appellant Wills was properly declared a delinquent by
9 Local Board No. 47 on October 21, 1965, and his constitutional
10 rights to free speech and to petition his Government were not
11 infringed by said determination of delinquency.

12 II, III & IV

13 THE CONSTITUTIONALITY OF PUBLIC LAW 89-152
14 IS NOT AN ISSUE IN THIS CASE

15 Appellant argues in Points II, III and IV of his
16 Opening Brief that Public Law 89-152, making it a crime to
17 knowingly destroy or mutilate a draft card, is unconstitu-
18 tional because the statute abridges appellant's First
19 Amendment right to freedom of expression (Point II); because
20 it was intended and enacted for the purpose of suppressing
21 dissent (Point III); and because it does not serve any
22 rational legislative purpose and consequently deprives
23 appellant of personal liberty without due process of law
24 (Point IV).
25

1 The constitutionality of Public Law 89-152 relating to
2 the burning or destruction of draft cards is not an issue in
3 this case because the appellant has not been charged with
4 violating said statute. Appellant has only been charged by
5 Indictment with knowingly, wilfully and unlawfully refusing
6 to be inducted into the Armed Forces of the United States on
7 or about February 24, 1966, in violation of 50 U.S.C.App.
8 Section 462 and 32 C.F.R. 1632.14. The above cited regulation
9 provides as follows:

10 (a) When the Local Board mails to a registrant
11 an Order to Report for Induction (SSS Form
12 No. 252)...., it shall be the duty of the regis-
13 trant to report for induction at the time and
14 place fixed in such order...

15 Since appellant was not charged with nor found guilty of
16 violation of Public Law 89-152, the constitutionality of said
17 statute is not an issue before this Court. The draft card
18 burning statute enters this case only indirectly in connection
19 with the Notice of Delinquency, which issue was discussed
20 supra. in Points I and V.

21 Nevertheless, the draft card burning statute (Public
22 Law 89-152) has been tested before the Second and Eighth
23 Circuits and the statute has been held constitutional in both
24 United States v. Miller, 367 F.2d 72 (2nd Cir. 1966)
25 cert. den. _____, and in United States v. Smith, 368 F.2d
529 (8th Cir. 1966). The First and Fifth Amendment arguments

1 set forth in appellant's opening brief herein were fully
2 discussed in the Miller case, supra, and to reiterate Judge
3 Tyler's opinion in this brief would be repetitious. It
4 should be noted, however, that the First Circuit in O'Brien v.
5 United States, ____ F.2d ____ (1st Cir. 1967) created a split
6 in the Circuits by recently holding the statute to be unconsti-
7 tutional. However, the First Circuit affirmed O'Brien's
8 conviction for violation of 50 U.S.C. Section 462(b) on
9 grounds that he did not have his draft card in his possession
10 after he had burned it.

11 VI & VII

12 APPELLANT WAS ADVISED OF RIGHTS TO PERSONAL
13 APPEARANCE AND TO APPEAL BY THE NOTICE OF
14 RECLASSIFICATION ISSUED ON OCTOBER 23, 1965;
15 HE FAILED TO EXERCISE THESE RIGHTS AND THUS
16 FAILED TO EXHAUST HIS ADMINISTRATIVE REMEDIES

17 Appellant's Selective Service file reveals that he was
18 declared a delinquent and reclassified I-A on October 21,
19 1965. Two days later, Wills' Local Board sent him an
20 SSS Form No. 110 by which he was advised of his reclassifica-
21 tion to I-A and by which he was further advised of his right
22 to appeal the change of classification, of this right to a
23 personal appearance before the Board, and of his right to
24 obtain information regarding his reclassification from any
25 Selective Service Board (EX 2). However, the Local Board did
not send Wills a Delinquency Notice until January 3, 1966.

1 Wills contends, therefore, that he was prejudiced by the
2 delay and was denied procedural due process because he did
3 not know the reason for his I-A classification. (The reason
4 for the delay appears to be that the Local Board was
5 requesting the advice of the State Director of Selective
6 Service for the State of California as to whether or not it
7 should order Wills for immediate induction. An affirmative
8 reply from the State Director was received by the Local Board
9 on December 27, 1965, at which time the Delinquency Notice
10 was then forwarded to the registrant).

11 A. Lateness In Sending Delinquency Notice Didn't
12 Prejudice Appellant Because He Already Knew
13 Reason For Reclassification

14 32 C.F.R. 1642.4(a) provides that a Local Board may
15 declare a registrant to be delinquent whenever he has
16 failed to perform any duty required of him under the Selective
17 Service law. 32 C.F.R. 1642.4(b) provides that when a regis-
18 trant is declared delinquent, the Board should (1) note this
19 fact in registrant's Classification Questionnaire, (2) prepare
20 a Delinquency Notice, and (3) mail the original of the
21 Delinquency Notice to the registrant. Local Board No. 47
22 immediately accomplished the first and second requirement,
23 but did not fulfill the third requirement until January 3,
24 1966, about two months later.

25 The purpose of the requirement of mailing a copy of the
Delinquency Notice to the registrant is to make him aware of

1 his delinquency and the reason therefor. Receipt of a
2 Delinquency Notice by the registrant would be important when
3 he had unknowingly failed to perform a required duty or when
4 a third party had furnished information to the Board alleging
5 that the registrant had so failed to perform his duties.
6 That is not the situation in this case. Wills wrote his
7 draft board and told them that he had "intentionally destroyed
8 my draft card and will henceforth refuse to carry another."
9 He further advised his Board in the letter "I will refuse to
10 co-operate with your office in any manner whatsoever." He
11 then challenged his Board to act against him in the following
12 language:

13 If you wish to take any measures against me,
14 you can contact me at the following address...

15 Hence, it is impossible to visualize how Wills could have
16 been misled when he received a Notice of Reclassification
17 into Class I-A, which Notice was postmarked a week after he
18 mailed his letter to the draft board. The facts that he
19 had placed himself in a delinquent status by his own positive
20 and overt action, and had invited the Board to take action
21 against him, strongly suggest that he knew why he was
22 reclassified I-A.

23 32 C.F.R. 1642.3 casts strong doubt as to whether a
24 Local Board is even required to immediately send out
25 Delinquency Notices. It states:

1 Compliance by a Local Board or any other
2 agency of the Selective Service System
3 with any or all of the procedures prescribed
4 by the regulations in this part is not a
5 condition precedent to the prosecution of
any person under the provisions of Section 12
of Title 1 of the Universal Military Training
and Service Act, as amended (32 C.F.R. 1642.3).

6 Even if immediate Notice is required, said Notice would not
7 have given appellant any information of which he was not
8 already aware.

9 This Court has covered the topic of procedural irregu-
10 larities in Knox v. United States, 200 F.2d 398 (9th Cir.1952):

11 Procedural irregularities which do not result
12 in prejudice to the registrant are to be dis-
regarded.

13 And in Shaw v. United States, 264 F.2d 118 (9th Cir. 1959)
14 the same Court stated:

15 An appellate court is not required to search
16 the record with a microscope in an effort to
find minute but harmless flaws in the work of
administrative bodies or the lower courts.

17 B. Delinquency Notices Do Not Afford Registrants
18 Any Procedural Rights

19 There is no merit in appellant's conclusion, contained
20 on page 58 of his opening brief, that the "failure of the
21 draft board to notify appellant of the Declaration of
22 Delinquency in October stripped him of several procedural
23 protections afforded him by the Selective Service Regula-
24 tions..." A Declaration of Delinquency of itself does not
25 afford a registrant the right to a personal appearance, to a

1 reopening, or to an appeal. 32 C.F.R. 1642.14 provides that
2 a registrant can request a personal appearance before his
3 Board and take an appeal only when he has been classified in
4 or reclassified into Class I-A or I-AO under the provisions
5 of 32 C.F.R. 1642. Hence, even if the Local Board had mailed
6 the Delinquency Notice to Wills in October, 1965, said Notice
7 by itself would not entitle him to a personal appearance or
8 to an appeal.

9 C. Appellant Was Advised Of Right To Personal
10 Appearance And To Appeal On October 23, 1965,
11 But Did Not Exercise These Rights; Hence He
12 Failed To Exhaust His Administrative Remedies

13 After Wills had been declared delinquent on October 21,
14 1965, he was reclassified into Class I-A by the Local Board on
15 the same date. A Notice of Classification (SSS Form No. 110)
16 was mailed to Wills on October 23, 1965, advising him of his
17 new I-A classification. The Notice of Classification also
18 advised him of his rights to a personal appearance and to an
19 appeal in the following language:

20 If this classification is by a Local Board,
21 you may, within ten days after the mailing
22 of this Notice, file a written request for
23 a personal appearance before the Local
24 Board (unless this classification has been
25 determined upon such personal appearance).
Following such personal appearance, you may
file a written notice of appeal from the
Local Board's classification within the
applicable period mentioned in the next
paragraph after the date of the mailing of
the new Notice of Classification. If you
do not wish a personal appearance but do

1 want to appeal your case, you may do so by
2 making such an appeal in writing to your
3 Local Board, within the specified time...

4 If an appeal has been taken, and one
5 or more members of the Appeal Board dissented
6 from such classification, you may file a
7 written notice of appeal to the President
8 with your Local Board within ten days after
9 the mailing of this Notice.

10 Hence, Wills was fully advised of all the procedural rights
11 to which he was entitled. Furthermore, he was advised by the
12 SSS Form No. 110 to visit any Local Board for advice or
13 information concerning his reclassification. This was set
14 forth in the following language contained within SSS Form
15 No. 110: "For information and advice, go to any Local Board."

16 Wills failed to take any action at all. He did not
17 visit a Local Board; he did not request a personal appearance;
18 he did not seek an appeal. Even after receiving the
19 Delinquency Notice on January 3, 1966, Wills took no action,
20 even though he could have contacted his Local Board before an
21 Induction Order issued on January 31, 1966. The issue of the
22 Delinquency Notice was not raised until the actual trial of
23 this case.

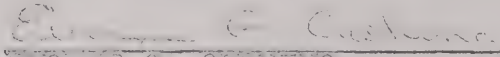
24 The law is very clear that a registrant must exhaust all
25 of his administrative remedies with the Selective Service
System before he can attack his classification in a Court of
law. Evans v. United States, 252 F.2d 509, 511 (9th Cir. 1958);
Falbo v. United States, 320 U.S. 549, 88L.Ed. 305 (1944)

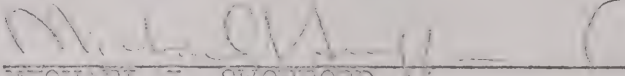
1 (and numerous other cases). Having been advised of his
2 reclassification into Class I-A on October 23, 1965, and
3 having been further advised of his right to a personal
4 appearance and to an appeal, Wills did nothing. Accordingly,
5 he failed to exhaust administrative remedies and cannot
6 complain of his classification at this time.

7
8 CONCLUSION

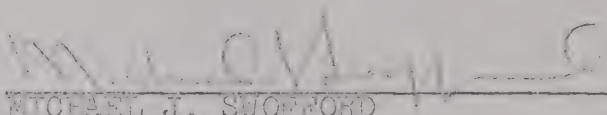
9 Wills was properly declared a delinquent on October 21,
10 1965, for non-possession of his draft card. He was properly
11 reclassified into Class I-A on October 21, 1965, because of
12 his delinquency and was immediately advised of said reclassi-
13 fication and of the appeal rights attached thereto. Wills
14 failed to seek a personal appearance or to appeal his
15 classification, and because he failed to exhaust these
16 administrative remedies, he is precluded from attacking his
17 classification now. Accordingly, the Order for Induction was
18 valid, and having refused to be inducted, Wills is guilty as
19 charged. Therefore, the United States respectfully contends
20 that the judgment of the District Court be affirmed.

21 Respectfully submitted,

22 
EUGENE G. CUSHING
United States Attorney

23 
24 MICHAEL J. SWOFFORD
25 Assistant United States Attorney

1 I certify that, in connection with the preparation of
2 this brief, I have examined Rules 18 and 19 of the United
3 States Court of Appeals for the Ninth Circuit, and that, in
4 my opinion, the foregoing brief is in full compliance with
5 these rules.


6
7 
8 MICHAEL J. SWOFFORD
9 Assistant United States Attorney

10 I hereby certify that a copy of the aforesaid Brief of
11 Appellee was mailed this date to

12
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15 1500 Hoge Building
16 Seattle, Washington 98104

17 Counsel for Appellant

18 DATED at Seattle, Washington, this 22nd day of June,
19 1967.

20 
21 MICHAEL J. SWOFFORD
22 Assistant United States Attorney
23
24
25

N O. 2 1 3 8 3

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CARL LEE HANKINS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

FILED

JUN 20 1967

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CARL LEE HANKINS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

Appellant, Carl Lee Hankins (hereinafter referred to as "Hankins") was indicted by the Federal Grand Jury for the Southern District of California on December 29, 1965. ^{1/} The indictment contained six counts alleging that on or about December 9, 1965, Hankins aided and abetted one Robert W. Deverell in making false claims against the government in violation of Title 18, United States Code, Section 287 and Section 2 [C. T. 2-8].

^{1/} C. T. refers to Clerk's Transcript.

On January 31, 1966 Hankins was arraigned in Los Angeles, California and entered a plea of not guilty to the charges contained in the above-mentioned indictment [C. T. 22]. Trial by jury commenced on February 17, 1966 before the Honorable Irving Hill, United States District Judge [C. T. 23].

Judge Hill granted the defendant's motion for acquittal on Counts one, two, four and six [C. T. 24]. On February 18, 1966 the jury returned a verdict finding defendant Hankins guilty on Counts three and five of the indictment. On March 18, 1966 the court sentenced Hankins to four years incarceration on Count three and four years incarceration on Count five, said sentences to run consecutively [C. T. 26].

On March 29, 1966, a notice of appeal was filed pursuant to Rule 37(a)(1) of F. R. C. P. [C. T. 28].

The jurisdiction of the District Court was based upon Sections 287 and 2 of Title 18, United States Code. This Court has jurisdiction to review the judgment of the District Court pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

SPECIFICATION OF ERROR

- A. Was the verdict based upon the uncorroborated testimony of accomplices?
- B. Should this Court sustain a verdict which was based upon the uncorroborated testimony of

accomplices?

III

STATEMENT OF FACTS

On December 29, 1965, the Grand Jury for the Southern District of California returned a six-count indictment against Robert W. Deverell (hereinafter referred to as "Deverell"), James A. Smith (hereinafter referred to as "Smith"), and Carl Lee Hankins [C. T. 28]. This indictment alleged that on or about December 9, 1965 Deverell cashed six postal money orders at six different places. It further alleged that Deverell knew that these money orders had never been issued by the United States Post Office. Defendants Smith and Hankins were charged with aiding and abetting the commission of the crimes charged in the indictment.

Appellant's co-defendants, Deverell & Smith each plead guilty to one count of the indictment [R. T. 116, 154]. ^{2/} On February 17, 1966 defendant Hankins' trial by jury commenced [C. T. 23]. Defendant Hankins was found guilty by the jury on Counts three and five of the indictment [C. T. 25].

The Government called Deverell as its witness [R. T. 98]. Deverell admitted endorsing each of the six money orders [R. T. 100-103]. Deverell testified that he received the six money orders

^{2/} "R. T. " refers to Reporter's Transcript.

from defendant Hankins [R. T. 103], that Hankins directed him to endorse the money orders [R. T. 104], and that Hankins received the proceeds from nearly all of the money orders that were cashed [R. T. 105, 107, 108, 109].

The Government also called Smith as its witness [R. T. 139]. Smith testified that Hankins asked him to fill out some money orders [R. T. 143]. Smith testified that he filled out each of the six money orders in the presence of Hankins and Deverell [R. T. 146-148]. Smith also testified that Hankins instructed Deverell on how to cash the money orders [R. T. 148-149]. Smith admitted that Hankins had given him some of the proceeds from the money orders that were cashed [R. T. 155].

The Government called Jeanette Tucker to testify as a witness in this case [R. T. 75]. Miss Tucker testified that Hankins came to her residence on December 9, 1965 at approximately 8:00 a. m. [R. T. 75-76]. That Hankins visited for a short time and told Miss Tucker that he had some money orders [R. T. 77, 78]. Miss Tucker testified that Hankins returned to her home at about noon, December 9, 1966, and he was accompanied by Deverell and Smith [R. T. 78-80]. Miss Tucker saw them go into her bedroom and write on the money orders [R. T. 81]. However, Miss Tucker did not know what they were writing on these money orders [R. T. 81-82]. After they finished writing Hankins, Deverell and Smith returned to their automobile. Miss Tucker rode with Hankins, Deverell and Smith for a short distance [R. T. 83]. During this brief automobile ride Miss Tucker heard Hankins tell Deverell to

"try in the market across the street" [C. T. 84]. There is no testimony in the record that Miss Tucker participated in the preparation or the cashing of the money orders.

In addition, the Government presented evidence showing that Hankins' fingerprint was found on Exhibit 6, one of the money orders involved in the action [R. T. 125-127, 163-165].

The defendant, Hankins did not present any testimony in its case [R. T. 165]. However, on defendant's motion the court acquitted Hankins on Counts one, two, four and six because the money orders involved in those counts were not shown to have been presented to the United States for payment [R. T. 172, 176].

On February 18, 1966 the jury found defendant Hankins guilty on Counts three and five of the indictment [C. T. 25]. Hankins was sentenced to four years incarceration on Count three and four years incarceration on Count five, said terms to be served consecutively [C. T. 26].

IV

ARGUMENT

- A. CONTRARY TO APPELLANT'S CONTENTION, APPELLANT WAS NOT CONVICTED SOLELY UPON THE UNCORROBORATED TESTIMONY OF AN ACCOMPLICE.
-

Appellant's sole contention before this Court is dependent upon the premise that Hankins was convicted solely upon the

uncorroborated testimony of accomplices. Appellee disputes this position, in that the facts do not support the premise upon which appellant relies. The record is clear that the fingerprints of appellant were found on one of the money orders involved in this crime [R. T. 125-127, 163-165]. The record is clear that six money orders were discovered missing [R. T. 58-59] and that appellant had in his possession six money orders [R. T. 103, 146-148, 77-78]. It is not material that appellant was acquitted on the count involving the money order on which appellant's fingerprint was found, because the evidence is uncontradicted that appellant had this money order in his possession with the others for which he was convicted.

Even jurisdictions which do require corroboration of an accomplice's testimony would find the fingerprint corroboration present in this case more than sufficient. Braham v. State of Alaska, 376 P.2d 714, 715 (1962); and People v. Ray, 26 Cal. Rptr. 825, 828 (2nd D. C. A. 1962).

In the case now before this Court the testimony of Deverell, Smith and Miss Tucker (assuming for purposes of argument that she is an accomplice) operates to corroborate each others testimony. While mutual corroboration by accomplices is not generally considered sufficient in jurisdictions which require corroboration, it is submitted that this fact may be considered in attempting to evaluate the trustworthiness of the accomplice's testimony.

Appellant argues that Miss Tucker is an accomplice. This argument is premised on the facts that Miss Tucker's house was

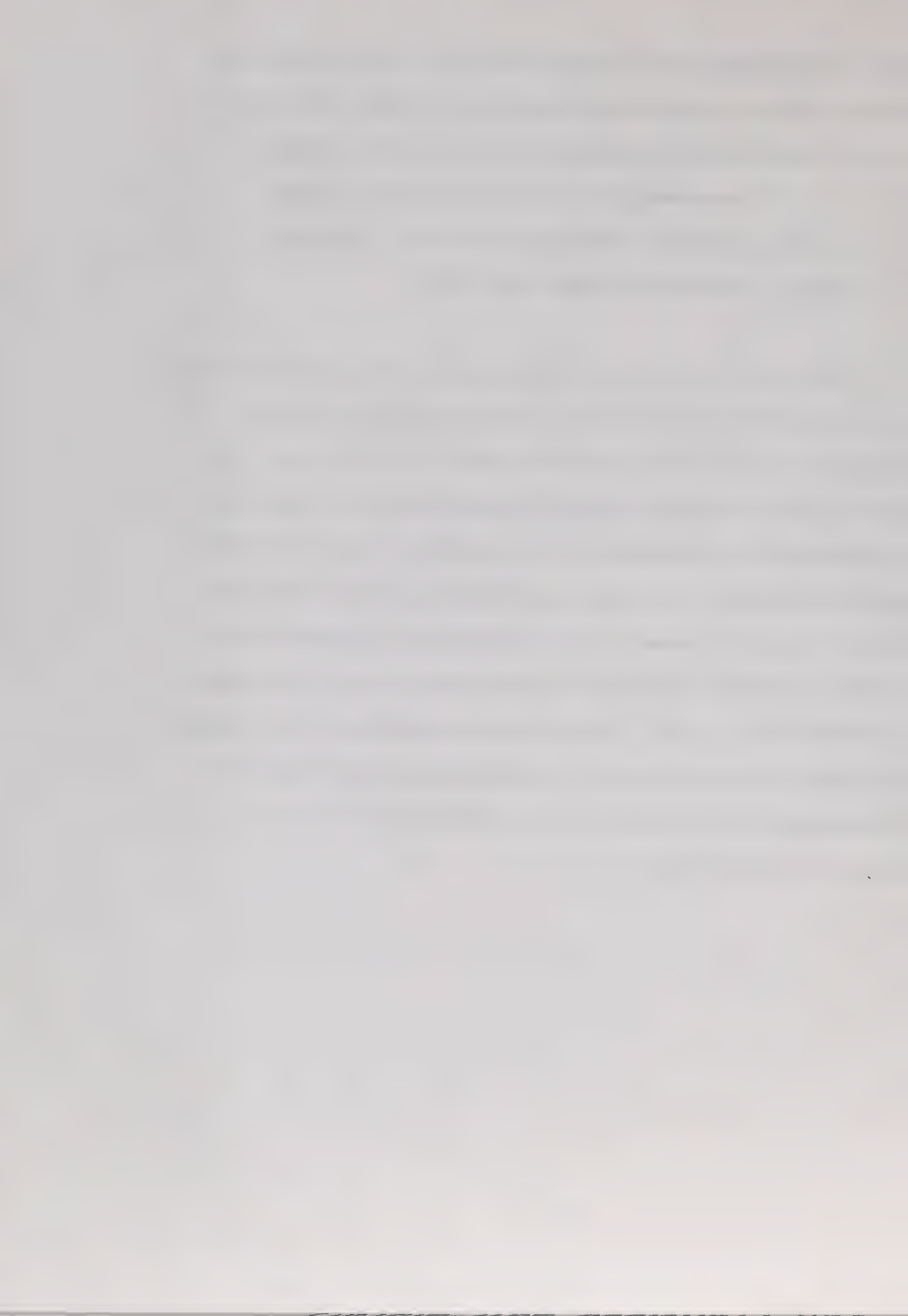
used to make out the money orders, that Miss Tucker provided the pen and pad and that Miss Tucker knew that Deverell, Hankins and Smith were going to cash the money orders. Appellee submits that those facts do not justify the conclusion that Miss Tucker was an accomplice to this crime. It is well established that an accomplice to a crime is one who unites with another person in the commission of a crime, voluntarily and with common intent to commit the crime. See Ing v. United States, 278 F.2d 362, 365 (9th Cir. 1960).

The only conceivable act of Miss Tucker that could be construed as a step in the commission of the crime is letting Hankins use her house and providing a pen and pad. Miss Tucker had known Hankins since 1963 [R. T. 86], so it is not unusual that she would allow Hankins into her house. Giving Hankins a pen and pad is a completely innocent act, because the record fails to show any evidence that Miss Tucker knew this pen and pad were to be used in the commission of a crime. Further, the record shows that Miss Tucker did not know what Hankins and Smith were writing on the money orders, that Miss Tucker was in no way counseled or informed as to what Hankins intended to do with the money orders except immediately prior to the cashing of the first money order [R. T. 84], that Miss Tucker did not participate in the cashing of the money orders and that Miss Tucker did not receive any of the proceeds from the cashed money orders. The record is also completely void of any evidence to show that Miss Tucker had any intent whatsoever to commit this crime or any other. It

Ellis v. United States, 321 F.2d 931 (9th Cir. 1963) wherein the defendant raised a corroboration issue like the issue now before this Court, and the Court rejected this contention by stating:

"The existing rule we have refused to change on many occasions; some quite recently. We again refuse." (Emphasis added) Id. at 933.

The reason for this rule appears to be based upon the concept that the trier of fact can determine whether the testimony of an accomplice is to be trusted, and the weight it is to be given. The jury was given the normal Mathes & Devitt instruction concerning the testimony of an accomplice [R. T. 212-213]. This instruction warns the jury that it is to treat such testimony with caution and in order to convict it must be believed beyond a reasonable doubt. See Mathes & Devitt, Federal Jury Practices & Instructions (West Pub. 1965) §9.04, p. 113. Considering the cautionary instruction, it is respectfully submitted that the prevailing Federal Rule on the testimony of an accomplice is well founded and should be reaffirmed by this Court.



CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the District Court be affirmed.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.,
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Assistant U. S. Attorney,
Chief, Criminal Division,

DENNIS E. KINNAIRD,
Assistant U. S. Attorney,

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United States of America.



CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Dennis E. Kinnaird

DENNIS E. KINNAIRD

See Vol. 3288

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

Nos. 20785, 21377

THE WESTERN PACIFIC RAILROAD COMPANY and the SOUTH-
ERN PACIFIC COMPANY, suing on their own behalf and
on behalf of all other railroads similarly situated,
Appellants,

v.

HOWARD W. HABERMEYER, THOMAS M. HEALY, and A. E.
LYON, individually and as members of the Railroad
Retirement Board, et al., *Appellees.*

Appeals From the United States District Court
for the Northern District of California,
Southern Division

BRIEF OF AMICUS CURIAE
RAILWAY LABOR EXECUTIVES' ASSOCIATION

FILED

JAN 26 1967

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**Appeals From the United States District Court
for the Northern District of California,
Southern Division**

**BRIEF OF AMICUS CURIAE
RAILWAY LABOR EXECUTIVES' ASSOCIATION**

INTRODUCTORY STATEMENT

The Railway Labor Executives' Association is an association consisting of the chief executive officers of twenty-two standard railway labor organizations. These twenty-two labor unions represent almost all the employees in the railroad industry, including the employees involved in

the decision of the Railroad Retirement Board (herein referred to as the "Board") which is the subject of these appeals.

We have examined the briefs of the parties in the District Court and the brief of the appellants in this Court. We assume that the brief of the Board in this Court will make substantially the same arguments as were made in the District Court; upon that assumption we believe that the Board fully disproves all the contentions of the appellants, although if the Board prevails only on one of the issues relating to the appellants' right or standing to seek judicial review of the Board's determination, the Court need not reach the appellants' contention with respect to the merits of the Board's determination.

The Railway Labor Executives' Association drafted and sponsored the original Railroad Unemployment Insurance Act (herein referred to as the "Act") and most of the amendments to that Act, and participated actively in all Congressional hearings on all proposed amendments to that Act. Although we believe that the Board has established that the decision below was proper, we believe that we are in a position to cast additional light on some of the issues involved; with respect to the remaining issues we rely upon the brief which we assume the Board will file.

SUMMARY OF ARGUMENT

1. The District Court found that under the provisions of the Railroad Unemployment Insurance Act a carrier is precluded from seeking judicial review of a determination by the Board granting unemployment benefits to employees. Accordingly, it held that appellants' complaint, seeking to review the Board's decision granting benefits to C-6 firemen (helpers), must be dismissed on the ground that the Court lacked jurisdiction over the subject matter.

The Court's holding is supported: (1) by the express terms of the Act which set forth precisely the extent and

subject matter of review available to a carrier from a Board determination, which does not extend to review of a decision of the Board granting benefits to employees; (2) by the relevant legislative history; and (3) by the only other case in which the issue was the subject of judicial decision.

2. Even if the appellants had standing to seek to review a determination of the Board that unemployment benefits should be paid, the Board's interpretation of the Act was a reasonable exercise of its discretion which, under well-settled principles, must be sustained. The Board's determination was, under the circumstances, a permissible interpretation and application of the Act.

ARGUMENT

I. The Act Does Not Permit Appellants To Challenge the Award of Benefits by the Railroad Retirement Board; on the Contrary, It Precludes Review of Such Determinations at the Instance of Carriers

The District Court's primary ground for dismissing the complaint was that the appellants are precluded from seeking judicial review of the determination of the Railroad Retirement Board that unemployment insurance benefits should be paid to C-6 firemen (helpers) who chose to receive severance pay rather than an offer of "comparable" employment with the railroads in accordance with the option given such employees under Section II, C (6) of the Award of Arbitration Board No. 282. The District Court's determination is supported by the language of the Railroad Unemployment Insurance Act, by the relevant legislative history, and by judicial interpretation of the Act in the only case known in which the issue was raised prior hereto.

Section 5(b) of the Act (45 U.S.C. § 355(b)) directs the Board to make findings of fact and decisions on claims for benefits. Section 5(c) provides for appeals and review within the Board. The right to such procedures

is confined to two areas. The first area provides that an employee whose claim for unemployment benefits is initially denied may appeal such determination. The second area provides that an employer who disputes a Board finding that it is an "employer" within the meaning of the Act or that it is liable for "contributions" has a right to a review of such determination. No other determination of the Board is made subject to review. Section 5(c) concludes:

"Any issue determinable pursuant to this subsection and subsection (f) of this section shall not be determined in any manner other than pursuant to this subsection and subsection (f)."

Subsection (f) provides the method of judicial review of Board decisions that are subject to review, by petition for review filed in an appropriate Court of Appeals, after which the Board is required to file a transcript of the record with the Court. The subsection recites that judicial review of Board determinations is limited to decisions made under subsection (c), namely, employee appeals from determinations denying the granting of benefits, and employer appeals from determinations establishing employer status. Subsection (g) provides:

"Findings of fact and conclusions of law of the Board in the determination of any claim for benefits . . . shall be, except as provided in subsection (f) of this section, binding and conclusive for all purposes and upon all persons . . . and shall not be subject to review in any manner other than that set forth in subsection (f) of this section."

It is difficult to conceive of language more explicitly denying judicial review other than pursuant to subsection (f). But the review procedures permit the carrier to seek review on matters pertaining only to the question of whether they are "employers" under the Act, and do not permit the carrier to seek review of a determination

on a claim for benefits unless such determination involves the question of employer status under the Act. These provisions were carefully drawn to give only the employee or his railway labor organization the right to contest a determination on a benefit claim not involving a question of employer coverage. We so intended it, the carriers so understood it, and Congress so understood it and enacted it. The carriers did not like it, and complained to Congress, but that is the way Congress enacted it. At the hearings on the original bill the Association of American Railroads testified at considerable length in opposition. One of its spokesmen complained that while the bill provided for appeals by employees on claims for benefits "there is no appeal provided anywhere in this bill for the railroads which pay the freight."¹ But Congress did not change the provisions.

Furthermore, the Railroad Retirement Act (45 U. S. C. § 228) has been amended to adopt the judicial review provisions of the Railroad Unemployment Insurance Act, and there is further evidence that Congress understood and adopted our view that the carriers had and should have no standing to challenge the Board's decision on a claim for benefits or annuities. Sec. 11; 45 U. S. C. § 228 (k). In the course of hearings in 1945 on a number of amendments to the Retirement Act which we drafted and proposed and which Congress enacted, including an amendment to provided judicial review initially in the then Circuit Courts of Appeals instead of in the District Courts as theretofore, there occurred the following:²

"Mr. O'Hara: Now, is it true also that practically all of these appeals would be on the part of the employees? . . . I understand that the employer generally is not concerned as to what the decision of the Board

¹ *Hearings* before the Senate Committee on Interstate Commerce on S. 3772, 75th Cong., 3rd Sess., June 3-9, 1938, p. 125.

² *Hearings* before the House Committee on Interstate and Foreign Commerce on H. R. 1362, 79th., Cong., 1st Sess., April 18-26, 1945, p. 1091.

is. I suppose that the only question that they might appeal on is whether so and so is an employee of the railroad. That is what they are interested in. I would think that that would be the only case.

Mr. Schoene: And it is a question of whether the employing unit is an employer?

Mr. O'Hara: That is right.

Mr. Schoene: In point of fact, I think that probably . . . a fair number of employers have appealed to the courts from status determinations; that is, from coverage decisions . . .

Mr. O'Hara: On that question?

Mr. Schoene: On that question. Of course the employer would not have an appealable interest in the question of what the amount of annuity of an individual would be or, for that matter, as to whether the particular individual is entitled to an annuity at all."

At the same hearings a spokesman for the carriers, in opposing a proposed amendment, which Congress enacted, which provided for a disability annuity based in part on disability of an employee for work in his regular occupation, stated: "Characteristically, the employer is left no voice in the matter." P. 556. And later the same witness referred to possible Board decisions granting such annuities as "unreviewable". P. 559.

It is thus perfectly plain that the Railway Labor Executives' Association, which drafted the legislation, and Congress, which enacted it, understood it to preclude judicial review, at the behest of an employer, of a determination of the Board that payments were or were not due to an employee. And as we have seen above, the carriers also so understood the provisions, and complained, but their complaints were unavailing. The Act has so remained since 1938.

Finally, in the only case in which the issue of the right of a carrier to seek judicial review of a determination by

the Board granting a claim for benefits was submitted for adjudication by a court, the court emphatically held that such review is precluded by the Act.

In *Railway Express Agency v. Kennedy*, 95 F. Supp. 788 (N.D. Ill., 1950), *affirmed* 189 F. 2d 801 (7th Cir. 1951), *cert. den.* 342 U.S. 830 (1951), the carrier filed suit to enjoin the Board from paying unemployment insurance benefits to its employees under certain circumstances. The basis of the carrier's contention was that the employees were disqualified for unemployment benefits by reason of Section 4 (a-2) (iii) of the Act (45 U.S.C. § 354 (a-2) (iii)). The carrier argued that the Board's determination that such employees were entitled to benefits was not in accordance with the Act and that the Board should be enjoined from making any further payments to such employees.

The District Court never reached the merits of the Board's determination. The District Court found that, for five separate reasons, the carrier's complaint should be dismissed without reaching the merits.

First, the District Court found that although the complaint named as defendants the members of the Board, individually and as members of the Board, the suit was in effect against an agency of the United States, which had not consented to such action, and which had not waived its right of immunity to be sued.

Second, the Court held that the unemployment fund is in the nature of "security taxes" for the benefit of employees, and as such, the United States is the owner of the fund, accountable only to the Congress, and the carrier had no pecuniary interest therein.

Third, the Court found that the Act requires the Board to determine the right of employees to receive unemployment benefits and such determination having been made, it is conclusive with the right of appeal under the Act

available only to objecting employees who have been denied benefits.

Fourth, the Court determined that there exists no statutory right in a carrier to object to or contest the findings and decisions of the Board granting benefits, even though they be incorrect. To hold otherwise, the Court stated, would delay prompt unemployment payments and render orderly administrative procedure impossible.

Fifth, the Court held that since the carrier's complaint sought to affect the employees' right to receive unemployment benefits, as found by the Board, such employees were indispensable parties to the action regardless of whether, as the carrier contended, the issue is one of law. The carrier's failure to join such parties was held to be additional ground for dismissing the complaint.

The first four grounds set forth by the District Court related to the jurisdiction of the Court to grant judicial review of a determination by the Board granting employees benefits and to the standing of a carrier to challenge such a determination by the Board. The Court held that it did not have jurisdiction to grant such review. These grounds, of course, are directly in point in this case. The fifth ground also is applicable here.

This Court set forth the criteria for determining whether a party is indispensable in the oft-cited case of *State of Washington v. United States*, 87 F. 2d 421, 427-428 (9th Cir. 1936). The test was based on four questions:

“(1) Is the interest of the absent party distinct and severable?

“(2) In the absence of such party, can the court render justice between the parties before it?

“(3) Will the decree made in the absence of such party have no injurious effect on the interest of such absent party?

“(4) Will the final determination, in the absence of such party, be consistent with equity and good conscience?”

The Court stated that if any of the questions must be answered in the negative, the absent party was indispensable. Certainly, the third and fourth questions, at least, must be answered in the negative in this case. The appellants challenge the right of C-6 firemen (helpers) to receive benefits to which the Board has held them entitled. A judgment in favor of appellants would have resulted in an injunction against the Board, enjoining continued payments to such employees. To contend, as do the appellants (Brief, pp. 57-61), that the rights of C-6 firemen (helpers) would not be adversely affected by the judgment of the Court simply is untenable. Accordingly, here too, as in the *Kennedy* case, the failure of the appellants to join the employees involved is a failure to join indispensable parties and further ground for dismissal of the complaint. The fact that it may be difficult or even impossible to join them makes them no less indispensable. As this Court concluded in the *State of Washington* case (87 F. 2d at 428):

“[T]he nonjoinder of an indispensable party is fatal error, and the court cannot proceed to a decree in the absence of such indispensable party, notwithstanding the fact that the joinder would oust the court of jurisdiction.”

See also *Provident Tradesmen's Bank & Trust Co. v. Lumberman's Mutual Casualty Co.*, 365 F. 2d 802 (3d Cir. 1966); *Stevens v. Loomis*, 334 F. 2d 775 (1st Cir. 1964).

The Court of Appeals for the Seventh Circuit, in affirming the decision of the District Court, did so specifically on three of the five grounds. Primarily, the Court of Appeals based its decision on the ground that a review of the Act and its legislative history established that Congress did not intend to give a carrier the right to review of a Board

determination granting benefits to employees. The Court stated (189 F. 2d at 804):

“A careful consideration of all these sections of the Act convinces us that Congress intended to grant a judicial review of the decisions of the Board on claims for compensation where the employee status was not denied by the carrier, only to employees whose claims to compensation have been disallowed in whole or in part.”

This excerpt from the opinion of the Court of Appeals expresses the core of the position of the Railway Labor Executives' Association, and the core of the decision of the District Court in this case. The appellants' brief devotes a footnote to it, on page 55.

The Court in *Kennedy*, emphasized its holding in its response to a contention that the carrier was entitled to judicial review pursuant to the Administrative Procedure Act. The Court stated (*ibid.*):

“*Since the Railroad Unemployment Insurance Act does preclude judicial review of the decision of the Board in the instant case on the petition of a carrier, it follows that the carrier is given no right to such judicial review by the Administrative Procedure Act.*” (Emphasis added.)

The Court thereafter determined that even assuming, *arguendo*, that the Act did not preclude the judicial review sought by the carrier, the carrier nevertheless did not have standing to sue for two additional reasons. First, because the contributions paid by the carrier constituted a type of tax and a taxpayer of federal taxes does not have standing to sue to prevent the expenditure of federal funds by the agency authorized by the statute to expend such funds. Second, in order to have standing to sue, the carrier is required to show that the alleged unlawful activity by the administrative body is resulting

in substantial harm, actual or impending, and the carrier could not establish that such was the case.

The appellants contend (Brief, pp. 34-41) that the *Kennedy* decisions were erroneous and should not be followed by this Court. To support their contention they cite a number of cases dealing with the general question of when a party has standing to sue. The brief of the Board adequately and convincingly deals with that contention and we will not attempt to meet that argument in this brief. It should be remembered, however, that the issue in this case of the appellants' standing to challenge the Board's determination granting benefits to C-6 firemen (helpers) is not to be determined merely upon an application of general principles of law. As the Courts in *Kennedy* found, aside from the application of general principles with respect to the issue of standing to sue, the Act clearly prescribes the persons entitled to seek judicial review of determinations of the Board and of the issues subject to judicial review, and the Act precludes judicial review available to a carrier except on the issue of "employer" status. Accordingly, the appellants' discussion of other cases, involving statutory provisions of different enactments and the standing of persons affected by such other legislation to seek review of decisions of the administrative bodies charged with administering such legislation, while perhaps relevant on the general rule concerning standing to sue, is of little or no relevance in the present case in which the applicable statute specifically defines the parties who may seek review of determinations of the Board, and the grounds upon which such review may be sought, and specifically denies the right of review in all other situations.

The appellants further argue (Brief, pp. 41-42) that, even assuming that *Kennedy* was correctly decided, it does not establish a precedent in this case because of what the appellants describe as "overwhelming" factual distinctions. A review of these factual distinctions, how-

ever, shows that they are of no relevant significance and would not have, to any extent, affected the decisions of the courts in *Kennedy*.

The first two distinctions described by the appellants are that in *Kennedy* only one carrier had brought an action to enjoin the Board while in the present case the suit is brought on behalf of 775 "employers" which contribute more than eighty-five percent of all amounts paid into the Account by the carriers; and that while the amount involved in *Kennedy* was slightly more than \$23,000, the amount here is more than \$2,500,000. There is nothing in either the opinion of the District Court or the Court of Appeals in *Kennedy* to support the proposition that the number of carriers filing a suit to enjoin a determination of the Board, or the amount of money involved, is relevant to determining whether the Act precludes judicial review by a carrier of Board determinations granting benefits to employees. Certainly, the holdings of the Courts, that the express statutory language of the Act precludes an employer from challenging such determinations, render irrelevant either the number of carriers seeking review or the particular sum of money involved.

The third and final alleged relevant distinction between *Kennedy* and this case is that at the time the *Kennedy* decision was rendered the Unemployment Insurance Account had a surplus slightly in excess of \$779,000,000 and the rate of contribution by employers was one-half of one percent. Based upon such facts, the appellants argue, the Court of Appeals in *Kennedy* felt the injury of which the carrier complained was only a future possibility. In the present case, however, the appellants conclude, the Account now has a deficit of \$250,000,000 and the "injury which the *Kennedy* court found to be 'only a future possibility' has been felt in full measure." The appellants' argument shows that they have misconstrued the Court's holding on this point.

As discussed above, the Court, in *Kennedy*, initially held that carriers are not entitled to judicial review of any decision of the Board granting benefits except decisions relating to employer status. The Court then went on to hold that even assuming, "*arguendo*," that a carrier was entitled to seek judicial review it would have standing to sue only if it could establish that the harm resulting from the decision of the Board is certain, substantial, and of an immediate nature. The carrier argued before the Court that the decision of the Board would result in harm in that it would lead to a decrease of the Account and possible increase in the percentage amount payable by the carrier. The Court rejected the argument on the ground that since the Account had a large surplus, which would have to be decreased by approximately \$350,000,000 before a change in the contribution rate would result, and since the amount involved in the case was relatively small when compared to such surplus, the determination of the Board could not possibly affect the carrier's rate of contribution and the harm complained of was no more than a speculative future possibility.

The rationale of the Court is equally applicable here. As the appellants point out, the Account now is approximately \$250,000,000 in arrears. Under the present law, the appellants' rate of contribution to the Account will not be changed until there is a credit in the Account of at least \$300,000,000. Section 8 of the Act (45 U.S.C. § 358). Thus, the Account will have to acquire approximately \$550,000,000 before there will be any change in the current contributions of appellants. The challenged payments in this case approximate \$2,500,000. If none of this amount had been paid, the effect would be that the amount necessary to be added to the Account to lower the current contributions of appellants would be reduced from \$550,000,000 to \$547,500,000. Obviously, in the overall picture, the amount involved herein is relatively small and the Court's statement in *Kennedy*, that the payment of the claims

there involved would not affect the rate of contributions for the current years and therefore the complaint refers only to a future possibility, remains relevant here.

The appellants' further contention that the Board's payments in this case may result in Congress increasing the rate of contribution by legislative enactment is even more speculative. Whether Congress will or will not change the current contribution rates, and if it does, the reason for such change, is certainly completely conjectural at this time. A number of factors, obviously, determine what action, if any, Congress may take. As noted by the Court of Appeals in *Kennedy* (189 F. 2d at 805):

"The condition of the fund and the resulting rate of contribution might also be affected by either a general depression or by a general boom in business."

II. The Board's Determination Granting Unemployment Benefits to C-6 Firemen (Helpers) Was a Reasonable Exercise of the Board's Discretion and Must Be Sustained

In the preceding portion of this brief we showed that, upon the basis of the relevant provisions of the Act, its legislative history, and the only case involving the issue, the merits of the Board's determination awarding unemployment benefits to C-6 firemen (helpers) was not subject to judicial review by appellants.

Should the Court nevertheless determine that appellants are entitled to judicial review and proceed to examine the merits of the Board's decision, we submit that the Board's determination must be sustained. The appellants contend that the Board's determination was erroneous for three reasons. First, they argue that the Board erroneously determined that all C-6 firemen (helpers) who chose to receive severance pay in lieu of a comparable job offer had not left work voluntarily without good cause and were not disqualified from receiving benefits under Section 4(a-2)(i) (B) of the Act (45 U.S.C. § 354(a-2)(i)(B)). Second, they argue that the Board erroneously

determined that all such C-6 firemen (helpers) had not failed without good cause to accept suitable work and were not disqualified from receiving benefits under Section 4 (a-2) (ii) of the Act (45 U.S.C. § 354 (a-2)(ii)). Third, they argue that the Board erroneously determined that such C-6 firemen (helpers) were entitled to benefits on an overall basis without making findings with respect to each individual C-6 firemen (helper).

Initially, it must be noted that in order for appellants' position to be sustained, it would be necessary for this Court to find not only that the Board's interpretation of the Act was erroneous, but also, that it was arbitrary and capricious as well.

The standard to be applied by a court in reviewing a determination of an administrative agency was set forth in *Udall v. Tallman*, 380 U.S. 1 (1965) wherein the Court stated (at 16):

“When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. ‘To sustain the Commission’s application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.’ *Unemployment Comm’n v. Aragon*, 329 U.S. 143, 153. See also, e. g., *Gray v. Powell*, 314 U.S. 402; *Universal Battery Co. v. United States*, 281 U.S. 580, 583.”³

The Court concluded (at 18):

“If, therefore, the Secretary’s interpretation is not unreasonable, if the language of the orders bears his his construction, we must reverse the decision of the Court of Appeals.”

³ See also, *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933), and *Power Reactor Development Co. v. Electrical, Radio & Machine Workers*, 367 U.S. 396, 408 (1961).

The rationale of the Board for each of its interpretations of the Act which have been attacked by appellants shows that the Board's interpretations were reasonable and cogent, and should be left undisturbed.

Thus, Section 4(a-2)(i)(B) of the Act provides that unemployment benefits are not to be paid to any employee who is found to have "left work voluntarily" without "good cause". The Board interpreted the word "work" as referring to the particular *job* performed by the employee. Accordingly, since the option of a C-6 fireman (helper) to accept a carrier's comparable job offer or severance pay arose from the decision of a carrier to *abolish* the job theretofore held by such employee, the Act's exclusionary provision relating to leaving work "voluntarily" obviously had no application. Surely, the Board's interpretation of the statutory language is not so unreasonable as to amount to an arbitrary abuse of discretion.

The appellants contend that the phrase "left work voluntarily" does not refer to the *job* held by the employee but refers to the *employment* of the carrier. Thus, the appellants argue (Brief, pp. 22-23) that since, in each case, the C-6 fireman (helper) was offered continued employment with the carrier (i.e., a comparable job) every C-6 employee who received benefits should be considered to have left employment voluntarily.

The appellants argue that the Board's interpretation is untenable since it could lead to a result that an employee would be entitled to unemployment benefits simply because the carrier abolished his job even though the carrier simultaneously with the abolishment of the job offered the employee other employment. Such argument, however, completely ignores Section 4(a-2)(ii) of the Act which deprives an employee of his right to unemployment benefits if he refuses without good cause an offer of "suitable work available." Thus, under the example of the

appellants, although the employee would not be excluded from receiving benefits by virtue of having left work voluntarily, he would be subject to exclusion for having failed to accept suitable work.

The appellants further contend (Brief, p. 26) that Arbitration Board No. 282 recognized that employees refusing comparable job offers would not be entitled to unemployment insurance and that such recognition was the reason for the severance pay allowance. The appellants state:

“What conceivable purpose could the severance allowance have had except to tide the men over until they were able to find other employment?”

This contention misconceives the basis of the Arbitration Award. Prior to the Arbitration Award, a carrier could not abolish a fireman's (helper's) job without agreement unless it abolished the entire crew. A fireman (helper) assigned to a particular crew had a vested interest in such job which was not subject to termination at the unilateral whim of the carrier. The Award of Arbitration Board No. 282 changed the situation. Pursuant to the Award a carrier was given the right to abolish a job. The quid pro quo for such right, with respect to C-6 firemen (helpers), was that such firemen (helpers) be offered comparable jobs or severance payments. The receipt of such payments by the C-6 firemen (helpers) amounted to additional compensation by the carrier imposed for the right to abolish the employee's vested contractual interest in the job to be abolished. Clearly, the requirement of the severance payment had nothing to do with “tiding the men over” until they found other employment. It was payable no matter how soon they found other employment.

The appellants next argue that even if the Board's determination of Section 4(a-2)(i)(B) was correct the Board nevertheless erred in not determining, on a case by case basis, whether the comparable job offers made by the carriers, and refused by the C-6 employees, amounted to

“suitable work available” which would have the effect of excluding such employees from unemployment compensation under Section 4(a-2)(ii) of the Act. The appellants urge that if it be found that a particular comparable job offer amounted to an offer of “suitable work,” an employee who chose instead to receive severance pay should not be eligible to receive unemployment benefits, unless such employee can show “good cause” for having refused such employment.

The Board’s reason for holding that no C-6 employee, who elected to receive a severance payment rather than a comparable job, could be considered to have refused suitable employment without good cause within the meaning of Section 4(a-2)(ii), likewise was reasonable and not an abuse of discretion.

As we showed above, the option presented to employees under Section C-6 of the Arbitration Award was in the nature of compensation by the carrier to the employee in return for the carrier obtaining the right to abolish a job to which the employee had a vested interest by reason of his seniority. The Board held that such employee was entitled to make a free choice between the two methods of payment for losing that right (i.e., a comparable job or severance pay) and that a decision to accept severance pay rather than a comparable job could not be considered, under such circumstances, as a refusal without good cause to accept suitable work within the meaning of the Act.

Finally, the appellants contend that the Board erred in making a blanket finding that all C-6 firemen (helpers) were entitled to benefits and in not making individual findings with respect to each of the C-6 employees who filed claims for unemployment benefits. The appellants concede (Brief, p. 21) that the District Court was correct in holding that the Act does not require the Board to make individual findings of fact when the right to benefits to be paid to claimants in a particular category can be determined

by one finding applicable to all members. The appellants state that such conclusion is “unassailable”. Their quarrel with the District Court is only because of their belief that in the present case the Board erred in holding the disqualification provisions of Section 4(a-2)(i)(B) and (ii) not applicable to C-6 firemen (helpers) who chose to accept severance pay rather than a comparable job. They argue that in applying such provisions individual findings must be made.

Accordingly, if the Court finds, as we believe it must, that the Board’s interpretation of the Act holding such provisions inapplicable was well within the sphere of its discretion, then even the appellants must concede that its argument with respect to the failure of the Board to make individual findings must be rejected,—assuming we reach the merits.

CONCLUSION

The appellants make other arguments in support of their position which we have not dealt with in this brief. The brief of the Board fully answers all such arguments and demonstrates their lack of merit. The judgment below should be affirmed.

Respectfully submitted,

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Certificate

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

MILTON KRAMER

No. 21374 ✓

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROGER LEE GLAVIN, ROBERT LORING CHESNEY,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal From the United States District Court
Central District of California.

BRIEF FOR APPELLANTS.

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FILED

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United States Court of Appeals
FOR THE NINTH CIRCUIT

ROGER LEE GLAVIN, ROBERT LORING CHESNEY,
Appellants,
vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal From the United States District Court
Central District of California.

BRIEF FOR APPELLANTS.

Jurisdictional Statement.

The pleadings and facts disclosing the basis upon which it is contended that the District Court had jurisdiction and that this Court has jurisdiction to review the judgments and orders involved herein are:

1. Appellant Roger Lee Glavin was tried on an indictment returned by the Federal Grand Jury in Los Angeles, California, for violation of laws of the United States, that is, 18 U.S.C., Sec. 2312 in two counts and 18 U.S.C., Sec. 2314 in a third count, charging that in the months of March and April 1966 he transported in interstate commerce from Los Angeles, California to other states two trucks and a trailer (over the value of \$5000) which he knew to have been stolen. [Clk. Tr. p. 2.]

2. Appellant Robert Loring Chesney was tried on an indictment, returned by the same grand jury, for violation of 18 U.S.C., Sec. 2 in two counts, charging that he aided and abetted Appellant Roger Lee Glavin in the commission of the two counts relating to transportation of the two stolen trucks in interstate commerce from Los Angeles to other states. [Clk. Tr. p. 2.]

3. 18 U.S.C.A., Sec. 3231 provides that the district courts of the United States shall have original jurisdiction of all offenses against the laws of the United States.

4. 28 U.S.C.A., Sec. 1291 provides that the courts of appeal shall have jurisdiction of appeals from all final decisions of the district courts of the United States, except where a direct review may be had in the Supreme Court.

Statement of the Case.

By indictment filed May 25, 1966 in the United States District Court, Central District of California [Tr. p. 2] Appellant Roger Lee Glavin was charged with violation of 18 U.S.C. Sec. 2312—transportation of motor vehicle in interstate commerce knowing the same to have been stolen—in two counts and violation of 18 U.S.C., Sec. 2314—transportation of stolen merchandise (refrigerated trailer) over the value of \$5,000 in interstate commerce, which was known to have been stolen . . .—and Appellant Robert Loring Chesney was charged with aiding and abetting (along with another defendant, Leon Leroy Glavin) in the commission of the two counts of transporting vehicles in commerce knowing them to have been stolen, this in violation of 18 U.S.C., Sec. 2. [Tr. p. 2.]

Each of the appellants were arraigned on June 6, 1966 and pleaded not guilty to each count of the indictment. [Minute Order 6/6/66, Tr. p. 5.]

At the time for trial on June 27, 1966, and prior to the commencement thereof, a motion was made by counsel who represented both appellants to be relieved from representation of Appellant Roger Lee Glavin, that there appeared to be a conflict of interest between the two defendants, that Mr. Glavin did not agree on the manner of representation and did not wish the counsel to represent him, which motion was denied. [Supp. to Rep. Tr. pp. 1-2.]

A motion to suppress was filed on behalf of Appellant Roger Lee Glavin on June 27, 1966 [Tr. p. 11.] The motion was heard on June 28, 1966 and denied. [Rep. Tr. pp. 98-128.]

The case was tried before a jury from June 27, 1966 through June 30, 1966. [Rep. Tr. pp. 6, 19, 20, 21.]

At the conclusion of the Government's case, the following motions were made by counsel for appellants: (a) A motion to strike the evidence which had been subject to the motion to suppress [Rep. Tr. p. 545]; (b) A motion on behalf of Appellant Chesney to strike an exhibit admitted in evidence [Rep. Tr. pp. 545-546]; (c) A motion on behalf of Appellant Chesney to strike Government Exhibits 14, G., H. and I. on claim or partial entrapment and non-possession by Chesney; (d) and, a Motion for a judgment of acquittal on behalf of Chesney which motions were denied. [Rep. Tr. p. 554.]

Objection was made to the court as to a proposed jury instruction relating to possession of recently stolen property [Rep. Tr. p. 562, lines 10-11] which was

overruled, and after having been given by the court an exception was taken to such instruction. [Rep. Tr. p. 604, lines 12-14; p. 605.]

The jury returned a verdict of "guilty" as to each appellant as to each count charged. [Rep. Tr. p. 608, line 1 to, p. 609, line 8.]

A motion for Judgment of Acquittal and a Motion for a New Trial were filed on behalf of both appellants and heard on July 12, 1967, both of which were denied. [Tr. pp. 24, 26 and 29.]

Sentence was then pronounced as to each appellant, sentencing each of them to five years in prison as to each count with the sentences to run on each count concurrently, which judgments were filed on July 12, 1966. [Tr. pp. 30 and 31.]

Notice of appeal was filed on behalf of both appellants on July 13, 1966. [Tr. p. 32.] Both appellants were admitted to bail pending appeal.

Specification of Errors.

1. The court erred in denying the motion of appellant Roger Lee Glavin to suppress the evidence relating to the search, subsequent arrest and seizure of documents, log books, gasoline receipts, etc., which search and seizure was claimed to be unlawful and illegal, and the subsequent admission into evidence over objection of the products of such search and seizure.

The motion to suppress was filed on June 27, 1966. [Tr. p. 11.] The motion was made upon the ground that such documents, papers and written data were taken as a result of unlawful search and seizure and that they were seized without a warrant and prior to

the time that defendant was arrested and at the time of the search there was no reasonable or probable cause therefor. [Tr. p. 11; Rep. Tr. pp. 98-128.]

The documents were admitted into evidence over objection as Government's Exhibit 12-E (13 receipts) [Rep. Tr. p. 1222; Ex. 12-L (driver's logbook) Rep. Tr. p. 431, line 7, to p. 432, line 7; Ex. 12-M (driver's logbook) Rep. Tr. p. 434, line 3, to p. 435, line 7.]

(The motion to strike this evidence which was denied is part of the same specification of error.) [Rep. Tr. p. 545, lines 18-24.]

2. The Court erred in admitting in evidence Government Exhibit 9-A (a receipt for purchase of truck parts having the name "Chesney Truck" on it) [Rep. Tr. p. 298, lines 18-19; and p. 343, lines 10-19] over the objection of defendant Chesney that the same was hearsay, irrelevant and immaterial and no foundation was laid connecting the same with or identifying the same to this appellant. [Rep. Tr. p. 297, line 9, to p. 299, line 5; and p. 336, line 4, to p. 343, line 19.]

3. The court erred in admitting over objection on behalf of appellant Robert L. Chesney of incriminating identification plates and other materials [Exs. 14-B to 14-I] which were in the possession of the police and not shown to have ever been in the possession of Mr. Chesney which the police caused to be momentarily placed in the hands of defendant Chesney and thereupon simultaneously arresting him (his arrest being accomplished at the time when he was not in the commission of a crime, nor in connection with any matter which would show probable cause for such arrest) utilizing this police controlled evidence to create the

impression before the jury that defendant was connected with the crimes charged.

Objection was made that there was not sufficient foundation, that the procedure was in the nature of entrapment, that the evidence was irrelevant and immaterial and that there was no proper connection of Mr. Chesney therewith and that it was improper and prejudicial to introduce police possessed and controlled evidence for the purpose of incriminating appellant Chesney when there was no other foundation for showing his connection therewith other than the police ruse used to get the evidence into his possession and arrest.

(Objection to all the exhibits and Exhibit 14-B) (Truck license plate) [Rep. Tr. p. 491, line 8, to p. 495, line 23; Ex. 14-C] (manila envelope) p. 498, line 21, to p. 500, line 14; Ex. 14-D, 14-E and 14-F (Manila envelopes) p. 503, lines 10-16; 14-G (engine I D tag) p. 504, line 18, to p. 505, line 25; 14-H and 14-I (small metal tags for I D Plates) p. 509, line 16, to p. 510, line 7.]

4. The court erred in instructing the jury over the objection of defendants [Rep. Tr. p. 562, line 10, to p. 566, line 8—actual instructions contained on p. 596, line 20, to p. 598, line 25] (the instruction in effect nullified to a great degree the presumption of innocence and in a large measure the Constitutional right of a defendant not to testify and that such failure to testify could not be used against him) as follows:

“Possession of property recently stolen, if not satisfactorily explained, is ordinarily a circumstance from which the jury may reasonably draw the inference and find, in the light of surround-

ing circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen.

“And, possession of property recently stolen if not satisfactorily explained, is ordinarily a circumstance from which the jury may reasonably draw the inference and find in the light of surrounding circumstances shown by the evidence in the case, that the person in possession not only knew it was stolen property, but also participated in some way in the theft of the property . . .”

5. The court erred in denying the motion made prior to the commencement of trial to be relieved from representing appellant Roger Lee Glavin when it was brought to his attention that there appeared to be a conflict of interest between the two defendants Roger Lee Glavin and Robert Loring Chesney in the handling of their defense, that defendant Glavin was not able to agree with the counsel as to the manner in which counsel proposed to handle his defense and that Glavin requested that the counsel who was also representing Mr. Chesney not represent him and did not wish Mr. Chesney's counsel to represent him. [Supp. to Rep. Tr. pp. 1-2.] This was also urged on the trial court as a ground for the motion for a new trial. It is respectfully urged herein that by denying such motion the court deprived each of these appellants of the right of full representation and independent representation of counsel of their choice and in the manner of their choice as is and reasonably should be guaranteed by the Sixth amendment of the United States Constitution.

6. There was an insufficiency of the evidence to sustain the verdict and judgment as to either of the appellants. Especially is this true if the court excludes evidence objected to as hereinabove set forth.

7. The court erred in denying the motion to strike and motion for judgment of acquittal made at the conclusion of the Government's case. [Rep. Tr. p. 545, line 18, to p. 554, line 10.]

8. The court erred in denying the motion for a new trial and the motion for judgment of acquittal made on July 12, 1966. [Tr. pp. 24-26.]

Summary of Argument.

1. Appellants' Constitutional Rights Denied by Jury Instruction Given.

Appellants urged that the court by instructing the jury (over their objection) that possession of property recently stolen *if not satisfactorily explained* was a circumstance from which the jury *may reasonably draw the inference and find*, that the person in possession not only knew it was stolen, *but also participated in some way in the theft of the property*, impaired and in effect denied the rights guaranteed by the Fifth Amendment of the United States Constitution to in effect remain silent and to suffer no penalty for such silence. Moreover, such instruction in effect overrides the presumption of innocence with which every accused is clothed.

2. Right to Adequate Assistance of Counsel Denied.

When it was brought to the attention of the court prior to the commencement of the trial that a conflict of interest appeared between the two defendants rep-

resented by the same counsel that one of the defendants objected to the manner of handling of the case by such counsel and did not want to be represented by him, the court in denying the motion to be so relieved from representing such defendant placed both defendants in a position of relative compromise as to the handling of the case thereby denying to both defendants the right of proper representation. It is urged that this conflict was such and as developed by the evidence clearly disclosed itself to be such that full and proper representation of either defendant was not possible so that by the court's ruling the Constitutional rights of both of the defendants were denied.

3. The Entrapment and "Deposit and Seizure" of Evidence on the Defendant Was Illegal, Rendering the Evidence Inadmissible.

While not the common place "entrapment" situation nor the usual "search and seizure" transaction, nevertheless, the device whereby the FBI and State Police taking incriminating license plates and auto identification tags relating to a vehicle which had been reported stolen, from a person whom they had arrested and released in relation to auto theft and having that person momentarily place a bundle containing such items in the hand of a defendant who such party had called to meet him, when such defendant was not committing any offense nor in violation of any law and then seizing such defendant with planted paraphernalia the court allowing the same to be used as evidence against such defendant to implicate him in crime without any showing of any other connection therewith was more offensive and repulsive than any true entrapment or any measure of unlawful search and seizure.

In essence the FBI and the police were shown to have schemed and devised a means of planting evidence not otherwise connected to a person on such person and instantly arresting him before he even received possession for the sole purpose of utilizing such evidence against him at court. The admission of such evidence was error and offends one's sense of justice.

4. There was Unlawful Search and Seizure Rendering Evidence Seized Inadmissible.

The Police had no reasonable or probable cause to further search the truck of defendant Roger Glavin, the registration and necessary papers having checked out and thus the searching of the truck in which defendant was riding and prior to arrest, violated the Constitutional right of defendant Roger Glavin against illegal search and seizure. The motion to suppress should have been granted and the evidence which was the product of such illegal search should not have been admitted.

5. Admitting Hearsay Document Not Found in the Possession of the Defendant Against Whom Admitted and Without Any Foundation Connecting the Defendant Thereto was Prejudicial Error.

The court by admitting a receipt for truck parts bearing a name similar to one of the names of defendant Chesney and gasoline charge tickets showing purchase of gasoline on a credit card bearing a name like that of defendant Chesney which were not obtained from the defendant Chesney nor otherwise connected up with him nor identified as relating to him was so prejudicial to defendant Chesney as to affect his substantial rights.

ARGUMENT.

I.

The Instruction That the Jury Could Infer Guilt From Possession of Recently Stolen Property Unless Such Possession Were Explained, Violated the Fifth Amendment and Abridged the Presumption of Innocence.

An accused is endowed with an overriding presumption of innocence which the law extends to every element of the crime charged.

Morrisetti v. United States, 342 U.S. 246, 72 S. Ct. 240.

The judiciary should not therefore improvise incriminating presumptions.

Morrisetti v. United States, *supra*.

Even the Congressional power to facilitate conviction by substituting presumptions for proof is limited by the Fifth Amendment of the United States Constitution.

Tot v. United States, 319 U.S. 463, 63 S. Ct. 1241.

It is expressly provided by Federal law that the failure of a defendant to testify shall not create any presumption against him.

18 U.S.C. §3481.

In fact the United States Supreme Court has long ago held that it is even reversible error not to instruct the jury that the failure of a defendant to request to testify shall not create any presumption against him.

Bruno v. United States, 308 U.S. 297, 60 S. Ct. 198.

It is embodied in our Constitution that one shall not be compelled in any criminal case to be a witness against himself.

U.S. Constitution, Fifth Amendment.

As stated in the case of *Malloy v. Hogan*, 378 U.S. 1 at page 8, 84 S. Ct. 489 at page 493

“ . . . the Fifth Amendment guarantees against Federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer the penalty . . . for such silence.”

Moreover, a judge or prosecutor's comment on a defendant's failure to testify is reversible error.

Griffin v. State of California, 380 U.S. 609, 85 S. Ct. 1229.

The instruction given by the court to the jury, who are not skilled in the technicalities of the law, in essence amounted to a comment on the failure of the defendants to testify. Stripped of its technical aspects and given the common understanding which a juror would glean from the words used in the instruction, the effect of the same was to advise them that if there were any recently stolen items found in the possession of the defendants that the defendants had the burden of proving how the possession came to them and if the defendants did not give such an explanation that the jury was at liberty to infer guilt therefrom.

Such an instruction coupled with the planting of evidence not otherwise connected to a defendant in his hands and arresting him to use the same against him forced an inference of guilt unless the defendant chose

to give up his constitutional rights to remain silent.

What this instruction did was to force an election. The defendants were put to the choice of either taking the stand and testifying and explaining or attempting to explain in the case of Mr. Glavin the possession of the truck, and in the case of Mr. Chesney the unconnected material attempted to have been planted in his hands by the FBI and the police or to forfeit the right guaranteed by the Fifth Amendment to remain silent and suffer no penalty thereby.

Such instruction is contradictory to the instruction of a presumption of innocence and is contradictory to the instruction that a defendant does not have to testify. The jury obviously would consider this a specific instruction and the others general and that the court was giving them license to penalize the defendants for not testifying which obviously was the result in this case. It is submitted that the giving of instruction that possession of property recently stolen if not satisfactorily explained was a circumstance from which the jury could find that the defendants not only knew the property was stolen but also participated in the theft [Rep. Tr. p. 596, line 20 to p. 598, line 25], was prejudicial error.

II.

Appellants Denied Adequate Assistance of Counsel by Court's Ruling.

As pointed out herein [Supp. to Rep. Tr. pp. 1-2] prior to the commencement of the trial these appellants who were represented by one counsel brought to the attention of the court that a conflict of interest between them appeared; that appellant Glavin was unable

to agree with counsel on his representation and did not desire, in light of the conflicts that the same counsel continue to represent him. A motion was then made by counsel to be relieved from representing Mr. Glavin which motion was denied.

As this court is probably well familiar with, the final examination of proposed exhibits to be presented by the Government are not always available to counsel for the defendant until just before trial which was the fact in this case. It was after the examination of the proposed evidence and the final conference with the appellants on the weekend before appearing for trial on June 27, 1966, that such conflict of interest between the two defendants became clearly apparant. Therefore, this was the first opportunity that existed on the part of counsel to bring this to the attention of the court and to be relieved in a situation where there were conflicting interests.

It would not have substantially prejudiced the Government or any other one to have delayed the trial for a day or two so that independent counsel could represent defendant Roger Glavin and to avoid a situation where one counsel was attempting to represent two defendants who had conflicting interests.

It is submitted that the end result was a compromise with only limited representation—and not adequate—of each appellant.

In such a situation that existed, full consideration to the separate interests of each of the defendants could not be given. Balancing the right of one defendant against the other in such situation, it was not possible to evaluate whether one defendant should take the witness stand and testify as to facts and refute cer-

tain claimed inferences lest such testimony bring the conflict into open and tend to incriminate the other defendant.

There simply was no way that either of the defendants could or were adequately represented as always the interest of one had to be compromised lest the interest of the other be impaired. Certainly, this is not the "assistance of counsel" contemplated by the Sixth Amendment of the United States Constitution nor by the Rules recently laid down by our Supreme Court.

As the Supreme Court has recently said, the Constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client.

Anders v. State of California, Decided May 8, 1967, 87 S. Ct. 1396.

The same expression has been made by the Supreme Court in the case of:

Entsminger v. State of Iowa (also decided May 8, 1967), 87 S. Ct. 1402.

Assistance of counsel, whether demanded by the Fifth or Sixth Amendment must be effective assistance.

Henderson v. United States, 231 F. Supp. 177.

One is entitled to effective representation of counsel.

Powell v. State of Alabama, 287 U.S. 45, 53 S. Ct. 55.

It is hardly conceivable that there can be effective representation where there is a conflict of interest.

Moreover, an accused is entitled to the services of an attorney devoted solely to his interests.

MacKenna v. Ellis (CA Texas), 280 F. 2d 592.

The Supreme Court has stated that the desire on the part of an accused to have the benefit of undivided assistance of counsel of his own choice should be respected and thus where it is shown that there is possible conflict of interest between two defendants charged with a crime, to deny one defendant the benefit of undivided assistance of a counsel of his own choice is the denial of effective assistance of counsel guaranteed by the Sixth Amendment.

Glasser v. United States, 315 U.S. 60, 62 S. Ct. 457.

It is, therefore, respectfully urged that in this situation prejudicial error was committed by the denial of the motion made to be relieved of representing Roger Glavin so that Roger Glavin could obtain the undivided assistance of a counsel of his own choosing where this was brought to the Court's attention before the trial commenced and at the earliest opportunity when it was possible so to do.

III.

Admission of Police Controlled Evidence, Planted by Them With Simultaneous Arrest for Use Against a Defendant Not Otherwise Connected Therewith and Who Was Committing No Offense Violated Defendant's Constitutional Rights and Was Error.

On May 2, 1966 the police after following a truck which they believed to have been stolen, arrested Leon Glavin, who was at the truck, and Bazil Buehler (who testified as a witness for the people in this case) who had accompanied him in another vehicle, for grand theft. [Rep. Tr. p. 294, lines 6-23; p. 295; p. 459, lines

8-14.] Mr. Buehler was later released. [Rep. Tr. p. 460, lines 8-11.]

On May 3, 1967, according to the testimony of Mr. Buehler, he received a telephone call from Mr. Chesney, who ran a machine shop in Glendale [Rep. Tr. p. 461, line 20; p. 463, line 10; p. 473, line 22; p. 474, lines 4-5] and who he knew was acquainted with Mr. Leon Glavin and his brother Roger Glavin (friends of Buehler), that Mr. Chesney asked him what had happened and he told him that he and Leon Glavin had been arrested for grand theft but that he had been released [Rep. Tr. p. 460, lines 8-11]; that Chesney said to him that Roger Glavin (Leon's brother) was there, that he didn't want to come over to Leon's house, and asked if he (Buehler) would get a package for him, that it was kind of important for him. [Rep. Tr. p. 460, lines 11-16.]

After the call from Mr. Chesney, he called the police officer who had participated in his arrest, told him about it. The officer told him to get the package and notify him. [Rep. Tr. p. 461, lines 7-12.]

Mr. Buehler testified that when he got home he told his wife he had to go over to Leon Glavin's house to get some stuff and take to Mr. Chesney's machine shop . . . that his wife told him Barbara, Leon's wife, had brought some things over earlier, that he looked in the sack and saw a couple of folders, a license tag and an aluminum plate. [Rep. Tr. p. 461, line 16, to p. 462, line 3.]

After checking the sack that had been left in his home by Barbara Glavin, he again contacted the police officer and enroute to Mr. Chesney's machine shop

met two officers and an FBI agent at a freeway turn-off near Colorado St. [Rep. Tr. p. 462 lines 11-21.]

The material in the sack was taken by the officers downtown to the police lab where it was photographed and labeled, taking two or three hours time. [Rep. Tr. p. 462, line 25, to p. 463, line 4; p. 485, lines 1-22.]

This was then returned to Mr. Buehler who proceeded to Mr. Chesney's place of business but no one was there so he contacted the officers and while officer Moeller was standing in the phone booth Buehler, at the direction of the police called Mr. Chesney at his home about 11:30 and made arrangement to meet Mr. Chesney at the bus terminal in North Hollywood. [Rep. Tr. p. 463, lines 9-21; p. 513, lines 14-24; p. 514, lines 23-24.]

The police and Buehler then proceeded to the location with the police and FBI agent keeping out of sight, that Mr. Chesney arrived about 12:15 A.M. and his car pulled up beside that of Mr. Buehler, being about 5 to ten feet apart; Mr. Buehler opened the back of his car and handed the bundle (which he had now wrapped in a blue shirt) to Mr. Chesney; that Mr. Chesney then started to move back toward his car (5 to 10 feet away) whereupon the officers and FBI agent grabbed him and placed him under arrest before he had reached his car and took from him the bundle which Buehler had momentarily handed him. [Rep. Tr. p. 477, lines 13-24; p. 480, lines 19-22; p. 486, lines 3-25; p. 516, line 8, to p. 519, line 25.]

Officer Moeller who assisted in the arrest stated that Chesney never prior to the arrest opened any of the

envelopes in the bundle. [Rep. Tr. p. 519, lines 16-25.]

In this bundle which Buehler claims to have gotten from the wife of Leon Glavin were the objects which were admitted in evidence over the objection of Defendants (as recited in No. 3 of Specification of Errors herein) as Exhibits 14-B thru 14-I being a truck license plate, manila envelopes and small metal ID tags from a truck. [Rep. Tr. p. 491, line 8, to p. 510, line 7.] a truck. [Rep. Tr. p. 491, line 8, to p. 510, line 7.]

It is strenuously urged that the procedure followed by the police in this situation was one which exceeds either entrapment—although having some of the attributes of entrapment—or unlawful search and seizure.

Here, and without challenging the veracity of Buehler whom they had arrested and released and who was working with them) the police took incriminating, evidentiary items obtained from a third—not shown to be reliable—source, and never shown to have ever been seen, possessed or been knowledgable to Chesney, retained possession of these and set up a ruse whereby Chesney was led to believe that he was receiving packages, the contents of which the police admit he never viewed, then arrested him for the obvious and sole purpose of using this police controlled evidence to tie him in to a crime with which he was not otherwise connected.

At the time of such arrest he was committing no offense and there was no reasonable or probable grounds for arresting him other than to have a basis by virtue of the material being placed in his hand, of arresting him for an offense with which it would ultimately ap-

pear to connect him. The material handed him was not a narcotic, lottery tickets or contraband, therefore, the colorable possession (the police at all times had possession) of the same would not and could not warrant an arrest.

This case is somewhat analogous to the situation in *Wong Sun v. United States*, 371 U.S. 484, 83 S. Ct. 407,

where the police used an arrested and then released informer and admitted that they would not have found the drugs which they sought to attribute to Wong Sun if they had not obtained help from the arrested one. However, in that case, possession alone was a crime. Here, that is not the fact.

To justify an arrest and the planting of evidence solely for the purpose of utilizing that evidence to incriminate a person in connection with the crime for which he was not arrested certainly shocks the sense of justice.

The motion to suppress could not apply in this situation because Mr. Chesney never had possession of the items. Possession was always retained by the police who exercised complete dominion and control over the paraphernalia but led Chesney into the ring which they were supervising and let him touch the item momentarily under their surveillance solely to bring the fact of touching to the attention of the jury to attempt to incriminate him in connection with another crime.

The Fourth Amendment puts the courts of the United States and Federal officials in the exercise of their power and authority under the limitations and restraints which are forever sacred to the people that their

persons shall be secure against all unreasonable searches, and seizures under the guise of law.

Mapp v. Ohio, 367 U.S. 644, 81 S. Ct. 1684 imposes the same restriction on State officers.

It is obvious from the evidence and from the analysis of Mr. Buehler's testimony that Mr. Chesney was doing Mr. Glavin a favor by picking up a bundle for him from his brother. The police, however, utilized this, without any foundation showing a connection of Mr. Chesney with the items to give him momentarily colorable possession and then arrest him so that they could use the evidence to tie him into a crime with which he was not otherwise shown to have any connection.

The admission, therefore, of these items in evidence violated the Constitutional rights of this defendant and was error. The ruse and device employed exceed any procedure on entrapment. Evidence obtained by entrapment is not sanctioned.

Williams v. U.S. (C.A. Miss.), 311 F. 2d 441.

The error is multiplied in this case in that the colorable possession which the police projected on to Mr. Chesney of the tags and items relating to the truck [Exs. 14-B—14-I] combined with the jury instruction that the jury was entitled to infer from possession alone of recently stolen property that the defendant was guilty, effectively wiped out the presumption of innocence and created through this evidence and instruction a presumption of guilt, which the jurors, being untrained in the niceties of the law, would find great difficulty in disregarding.

It is significant that when the objection was made that the items had never been in the possession of Mr.

Chesney [Rep. Tr. p. 499, lines 1-20] the court stated that the situation was the same thing as narcotics, that once delivery was made that was it and that was the ground for overruling the objection. [Rep. Tr. p. 499, lines 21-25.]

Looking then to narcotic cases (which appellants feel are not entirely comparable due to the fact that possession of the same alone is an offense which is not the situation here), the Supreme Court of California in the case of:

People v. Gory, 28 Cal. 2d 450, 170 P. 2d 433, has clearly set forth that the word "possession" means an "immediate and exclusive possession and one under the dominion and control of defendant".

Here, the defendant never had dominion or control. This at all times was retained by the police without ever an intent that the defendant should have or exercise any possession or control. All that the police wanted was that the evidence which they had should give the "appearance" of possession so that this might be used against the defendant.

IV.

The Unlawful Search Prior to Arrest and Seizure Rendered Evidence Taken From Roger Glavin Inadmissible.

On May 3, 1966, Lyman C. Ross, an employee of the National Automobile Theft Bureau saw a truck bearing the same color combination as the tractor which had been recovered on a previous day after having been stolen and he radioed an officer of the Highway Patrol who then followed the truck and when it stopped at a weighing station at the scales where the officer ordered

it to be driven over to an area for parking, the officer held the truck there and under his authority, the agent put on his coveralls and then started searching and examining the truck.

Prior to this, the officer had checked the registration and papers of the truck and found that they were in order. Mr. Ross, in the course of his checking and searching, claims to have discovered a number on the cab of the vehicle which corresponded to a number of one which had been reported stolen and then the driver of the truck, Mr. Rexius and the person who was with him, Mr. Roger Glavin, were thereupon arrested. [Rep. Tr. p. 108, line 18, to p. 112, line 20; p. 280, lines 9-22.]

The officer stated on cross-examination that the information upon which he made the arrest was that Mr. Ross who was searching the vehicle under the officers surveillance showed him a brass plate in the cab which corresponded with a number he had in a notebook. [Rep. Tr. p. 284, lines 12-17.]

It is obvious, therefore, that the police held defendant Glavin and his driver while Mr. Ross who had put on his coveralls made a search and then based upon the result of that search an arrest was made.

It is a well established principle of law that a search cannot be justified by what it turns up.

People v. Pereda, 229 Cal. App. 2d 814, 40 Cal. Repr. 566.

Moreover, arrest without a warrant must stand upon firmer ground than mere suspicion.

Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407.

If it is necessary to rely on a search to justify the arrest, the conclusion is inescapable that a search cannot justify the arrest because of the products thereof.

People v. Brown, 45 Cal. 2d 640, 290 P. 2d 528.

The law of the place where arrested determines the validity of search in absence of applicable Federal statutes.

United States v. Dyer, 332 U. S. 581, 68 S. Ct. 222.

This Court has ruled in effect that a search of automobile without a warrant prior to arrest when not made for the purpose of protecting the officers against weapons was illegal and violated the Fourth Amendment rights of the defendant.

Mosco v. United States, 301 F. 2d 180 (Ninth Circuit 62).

Common rumor or report, suspicion or even strong reason to suspect is not adequate to support a warrant for arrest. Thus, where officers investigating theft of interstate shipment of whiskey observed defendant loading cartons into automobile, it was held that they accomplished an arrest when they stopped the defendant's vehicle and they did not have probable cause at the time to arrest without a warrant. Thus, the search instant thereto was also unlawful.

Henry v. United States, 361 U. S. 98, 80 S. Ct. 168.

This case also holds that an arrest is not justifiable by what a subsequent search discloses.

It is therefore respectfully submitted that the motion to suppress should have been granted and the evidence admitted which was obtained from the vehicle searched at the Ventura Weighing Station was improper.

V.

**The Admission of Hearsay Documents Not Found
in Possession of Defendant or Connected Up
Was Prejudicial Error.**

As pointed out in Item 2 of specification of errors, the court admitted in evidence Government Exhibit 9-A which was a receipt for purchase of truck parts having the name of "Chesney Truck" on it. [Rep. Tr. p. 298, lines 18-19; p. 343, lines 10-19.]

The court also erred in admitting in evidence over objection the Government's Exhibit 12-E (Specification of Error No. 1.) [Rep. Tr. p. 422, lines 3-23.]

These documents were not found in the possession of Mr. Chesney, were not connected up in any way with Mr. Chesney. The first item, Exhibit 9-A was a receipt for truck parts in the name of Chesney Trucking.

The only conclusion the jury could have drawn from such hearsay evidence was that intended by the Government that Mr. Chesney was the person referred to on such receipt. No evidence was brought in to support this and there was no foundation laid for the introduction of this hearsay evidence.

Exhibit 12-E consisted of receipts for gasoline charged to Robert L. Chesney. These were taken from the truck at the Ventura Weighing Station as a result of the search to which objection was made and to which a motion to suppress was made.

There was no foundation to show that such charges were made with the knowledge, permission or consent of defendant Robert L. Chesney. The effect of this hearsay evidence was simply to accuse the defendant

without any foundation and to use evidence obtained from one defendant in a case not involving a conspiracy as some form of an admission against another.

In order to introduce in evidence a paper or document connecting up a defendant, some foundation must be laid showing that connection. Thus, it was held in this same court that the court erred in admitting in evidence a paper which a Government agent had obtained from the office files of a defendant which allegedly showed an intent to evade taxes where there was no proof of the genuineness or who wrote it and was not made in the regular course of defendants business.

Wolcher v. U.S., 200 F. 2d 493.

A private writing document or paper can only be admitted where there is extensive proof of identity and genuineness as the writing does not prove itself.

Hartzell v. U.S. (C.C.A. Iowa) 72 F. 2d 569.

Evidence raising merely suspicion or conjecture is not sufficient.

Harzell v. U.S., *supra*.

Conclusion.

For the reasons set forth herein, appellants respectfully urge that the judgments and conviction of the appellants should be reversed.

Respectfully submitted,

G. G. BAUMEN,

Attorney for Appellant.

Certificate.

I certify that in connection with the preparation of this brief I have examined Rule 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that in my opinion the foregoing brief is in full compliance with those rules.

G. G. BAUMEN

EXHIBIT A.

Index of Exhibits

	No.	Marked	Rec'd
Govt's	1	11	16
	2	31	36
	4-a	50	54
	4-b	50	58
	4-c	50	57
	4-d	50	62
	12-a	114	114
	5	159	164
	3a	169	169
	3b	169	169
	3c	169	169
	3d	169	193
	3e	169	169
	3f	169	169
	3g	169	169
	3h	169	213
	7a	222	240
	7b	222	240
	7c	222	240
	7d	222	240
	9a	289	343
	9b	289	300
	9c	289	304
	9d	289	306
	9e	289	307
	9f	289	308
	9g	289	330

	No.	Marked	Rec'd
Govt's	9h	289	336
	9i	289	310
	9j	289	311
	9k	289	314
	9L	289	315
	9m	289	320
	9n	289	323
	10	359	359
	11a	357	402
	11b	399	404
	11c	379	405
	12a	398	410
	12b	398	417
	12c	398	417
	12d	398	417
	12e	398	419
	12f	398	423
	12g	398	425
	12h	398	428
	12i	398	428
	12j	398	429
	12k	398	430
	12L	398	432
	12m	398	435
	12n	398	420
	13	398	441
	14a		
	14b	455	495
	14c	454	500
	14d	454	503

	No.	Marked	Rec'd
Govt's	14e	454	503
	14f	454	503
	14g	483	505
	14h	483	510
	14i	483	510
	15	526	526
	16	526	526
	17	526	526
	17a	538	581
	17b	538	581
	17c	538	581
	16a	538	
	16b	538	
	16c	538	
	18a	543	
	18b	543	
	18c	543	

No. 21374

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROGER LEE GLAVIN, ROBERT LORING CHESNEY,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal From the United States District Court,
Central District of California.

APPELLANTS' REPLY BRIEF.

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FILED

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APPELLANTS' REPLY BRIEF.

Preliminary Statement.

As the Jurisdictional Statement, Statement of the Case, Specification of Errors and Summary of Argument was stated fully in Appellants' (Opening) Brief, the material herein will be confined to responding directly, point by point to the Argument set forth in Appellee's Brief.

ARGUMENT.

1. The Instruction Given That the Jury May "Draw the Inference and Find" Guilt From Possession of Stolen Property Unless Defendants Explained Such Possession, Prejudicially Shifted the Burden of Proof to Defendants as to Their Innocence and Stripped Them of the Constitutional Guarantee That an Accused May Remain Silent and Suffer No Penalty Therefrom.

The government's defense of this instruction—requested by the government and given by court over the objection of Appellants [Rep. Tr. p. 562, line 8 to p. 566, line 11]—seems to be that since the court did not use the word “presumption” (of guilt) the presumption of innocence is intact. The government urges that by such selectivity of language the rights of the accused are preserved.

This is sheer sophistry. How much stronger language could the court have used? He told the jury that they could “FIND” guilt unless the defendants explained possession. To say that they (the jury) have the right to “Find” guilt from this situation is even stronger than a presumption. It appears to be without limit. They are given *carte blanche* permission to disregard any presumption of innocence unless possession is explained.

The government counsel argue that the courts have long been aware of the difference between presumptions and inferences . . . and that an inference does not demand a conclusion . . . therefore, the defendants have not been harmed by the instruction, that from possession the jury may “DRAW THE INFERENCE AND FIND” guilt, unless defendants explain it.

Stripped of all the niceties and expressed in the blunt language of the common man, this instruction says to the jury that if the defendants do not tell you how they got connected with the stolen property you may find them guilty from this fact notwithstanding any Constitutional rights they might otherwise have had not to testify and suffer no detriment therefrom.

One who is to suffer an “inference of guilt” for exercising his constitutional right to remain silent is in effect denied that right.

While it is submitted that this instruction goes far beyond a mere “inference” when it licenses the jury to “FIND” guilt if possession is not explained, even an “inference” of guilt denies defendants their constitutional right to remain silent and suffer no penalty.

The instruction in *Bruno v. U.S.*, 308 U.S. 287, p. 292, 60 S. Ct. 198, 199, approved by the Supreme Court, while mentioning the word “presumption” clearly rules out that an “inference” may arise from the failure of a defendant to testify and forbids the jury to weigh such fact against a defendant.

“The failure of any defendant to take the witness stand and testify in his own behalf, does not create any presumption against him; *the jury is charged that it must not permit that fact to weigh in the slightest degree against any such defendant, nor should this fact enter into the discussion or deliberations of the jury in any manner.*” (Emphasis added.)

What other source of explanation of possession could exist for Defendant Chesney—in whose hands the police and FBI thrust the tags and items from vehicles reported stolen (at a time when he was committing no offense . . . their purpose, apparently to use this as evidence to infer guilt)—except to testify? In this situation, if he elected to exercise the right guaranteed to him by the Fifth Amendment of the Constitution, not to testify, the jury was told (over strenuous objection) that it could from this fact (failure to explain) “draw the inference and find” guilt.

The court by this instruction—and the admission of this planted evidence—completely nullified any presumption of innocence and overruled the constitutional right not to testify and to suffer no penalty there-

from. Moreover, he shifted the “*burden of proof*” of innocence to the Defendants.

The same situation existed in the case of Mr. Glavin where the police and their civilian counterpart (using their presence and authority) first searched, then seized, then arrested for possession of a vehicle reported stolen. How could Glavin explain this situation to avoid the brand of an “inference of guilt” unless he gave up his constitutional right to remain silent? When he remained silent, the court told the jury he had a burden to explain and not having done so, they could infer and find guilt. Both the presumption of innocence and no penalty for not testifying went out the window, when the judge so instructed the jury.

In the case of *Helton v. U.S.* (CA Tex. 1955), 221 F. 2d 338, the Court stated, that in enacting 18 U.S.C. 3481, Congress,

“recognized that implicit in the privilege against self incrimination is not only the right to remain silent, but more important, *the right not to have that very silence give rise to an inference of guilt.*” (Emphasis added.)

The United States Supreme Court in the recent case of *Griffin v. State of California*, 380 U.S. 609 (614-15), 83 S. Ct. 1229 (1233), makes clear that such an instruction as given by the court here advising the jury that they may draw an “*inference*” of guilt where the defendant remains silent is forbidden.

“It is said, however, that the inference of guilt for failure to testify as to facts peculiarly within the accused’s knowledge is in any event natural and irresistible, and that comment on the failure does not magnify that inference into a penalty for asserting a constitutional privilege. * * * *What the jury may infer, given no help from the court, is*

one thing. What it may infer when the court solemnizes that silence of the accused into evidence against him is quite another. * * *

We take that in its literal sense and hold that the Fifth Amendment, in its direct application to the Federal Government . . . forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." (Emphasis added.)

The law does not impose on a defendant the duty to produce any evidence.

United States v. Schneiderman, 106 F. Supp. 906.

It is not proper for a court to draw attention by means of intimations on the failure of a defendant to testify.

United States v. Weir (C.A.N.C.), 348 F. 2d 453.

Where the court instructed the jury that there should be no inference from the fact that the defendants did not take the stand, then instructed the jury:

" . . . but, by the same token, you can weight in your mind that fact that they did not with everything else heretofore said to satisfy you of their guilt."

this was held reversible error.

United States v. Ward (CCA 3rd), 168 F. 2d 226, p. 227.

Where the court instructed jury:

" . . . and, though no unfavorable inference can be drawn from failure of accused to testify, yet this rule does not relieve him from satisfactorily accounting for possession of stolen property, either by his own or other testimony".

this was held to be reversible error.

State v. Rock (La.), 110 So. 482, 162 La. 299.

Lastly, in this point, the government has quoted on page 22 of their brief the general instruction given by the court that no inference of guilt may be drawn from the failure of the defendants to testify. It is respectfully submitted that this is overridden and contradicted by the *specific* and *detailed* instruction, of which the appellants complain (an instruction that even wove the evidence into its terminology.) With contradictory instructions, the jury certainly would follow that which was detailed, specific and which undertook to recount items in evidence.

It matters not how you view such instruction, its natural effect was to wipe out the presumption of innocence, shift the burden to defendants and penalize them for exercise of their right to remain silent. It was therefore prejudicial and reversible error.

2. Where Fact of Conflict Was Made Known to Court by Attorney Representing Two Defendants, Prior to Start of Trial, It Was Court's Duty to Appoint or Allow Obtaining of Other Counsel for One Defendant, and Forcing to Trial Represented by One Attorney Denied Each Defendant the Constitutional Right of Effective Assistance of Counsel.

The government argues in its brief that this was purely a matter of discretion with the court; that the Defendants had some burden of proof on this matter which they did not carry by a preponderance of the evidence, that the record shows no conflict of interest, and that the defendants were obviously guilty anyway. (So, in effect, what difference did it make.)

With all of these contentions appellants heartily disagree.

Before the trial started the Court was told:

“Your honor, *it appears there may perhaps be a conflict of interests here.* I appear for both Mr. Roger Glavin and Mr. Chesney. *Mr. Glavin and I have not been able to agree on my representation, and he has indicated that he does not wish me to represent him.* I would therefore move the court at this time to be relieved of representing Mr. Glavin.” [Supp. Tr. p. 2, lines 8-15.] (Emphasis added.)

The court did not inquire as to the nature of the items of conflict, he afforded no opportunity to disclose these (*which it is urged could only have been done to the court out of the hearing of the U.S. Attorney*), but summarily denied the motion and directed that we proceed to try the case! [Supp. Tr. p. 2, lines 16-23.]

It would have been a breach of the attorney’s duty to his clients to have openly spread in the record—to the possible detriment of one or both of the clients—their difference of views regarding their connection with the transactions charged in the indictment. The proper procedure was followed, that is to advise the court of this possible conflict and disclose an *actual hostility of one defendant toward the attorney’s representation*. If the court, in face of this, felt more facts should be given before ruling, the procedure would be to have a hearing outside the presence of the prosecution (which the defendants were prepared to present).

However, *the court did not challenge or dispute the existence of a conflict of interest . . .* (and from the record, might be said to have accepted it) but based his denial upon the fact that “these people are entitled to a speedy trial” that “we are here this morning ready to try this case” and the defendants should have had sufficient time to get whatever representation they desired.

Thus, the court, in the interest of some claimed expediency (he did not ask if we could have had counsel within the day) and regardless of conflict of interest ordered the two defendants to trial represented by the one lawyer—a lawyer whom one of the defendants—with the knowledge of the court—did not want to represent him.

That is the record. No burden of proof was required. It was not in the face of the record a matter of discretion with the court. It was a duty of the Court in his responsibility to protect the rights of defendants charged with crime to see that they have adequate assistance of counsel. That duty was breached and Appellants were both denied their constitutional rights to such assistance.

Faced with such a ruling what would any competent counsel do? He would not get up and argue with the Court. The court has in no uncertain terms made a ruling. Counsel, in respect for the court, must accede to the ruling and do his very best to represent both defendants.

It would be his duty, in such a situation, to shield each defendant, as far as possible from having this conflict come out in open where the jury may see it and perhaps prejudice one or both defendants. It would be his duty to be alert in the interest of each defendant and to compromise (but not openly) wherever the interests appeared to him to be opposed. By such compromise, he realized that in each instance he was not fully and adequately representing one or the other of the defendants. Such was the handling of this case. There was no other choice in the face of the Court's ruling!

The language in the case of *Glasser v. United*

States, 315 U.S. 60 (75-76), 62 S. Ct. 457 (467-8) is very apropos to the situation in this case:

“There is yet another consideration. *Glasser wished the benefit of the undivided assistance of counsel of his own choice. We think that such a desire on the part of an accused should be respected. Irrespective of any conflict of interest the additional burden of representing another party may conceivably impair counsel’s effectiveness.* * * *

“The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial. * * *

“Of equal importance with the duty of the court to see that an accused has the assistance of counsel is its duty to refrain from embarrassing counsel in the defense of an accused by insisting or indeed, even suggesting that counsel undertake to concurrently represent interests which might diverge from those of his first client, when the possibility of that divergence is brought home to the court.” (Emphasis added.)

As stated in *Porter v. U.S.* (5th Cir.), 298 F. 2d 461, 463:

“The constitutional guarantee of effective representation is not present when the counsel is in a duplicitious position where his full talents as a vigorous advocate having a single aim of acquittal by all fair means, are hobbled or fettered or restrained by commitments to others.”

See also, *McGuire v. U.S.*, 289 F. 2d 405. In the recent case of *People v. Crovedi* (Sept. 1966), 65 A.C. 197, 53 Cal. Rptr. 284, the California Supreme Court expressed the present rule on such matters:

“Likewise, in cases involving the representation of multiple defendants by a single attorney, an ac-

cused must be afforded reasonable opportunity for representation by retained counsel of his own choice whether or not a conflict of interest is shown. A diversity of interest in the sense of any factual inconsistency between the defenses advanced *is not the sole or necessarily the controlling consideration underlying the requirement that counsel for a co-defendant not be forced upon another defendant.* It is not necessary for (the defendant seeking independent representation) to show that he had some diversity of interest from (his co-defendant) * * *; entirely apart from any factually apparent diversity of interests (the defendant is) *entitled to the undivided loyalty and untrammelled assistance of his own counsel.*" (Citations.) (Emphasis added.)

As stated in *Holland v. Boles* (D.C.), 225 F. Supp. 863:

"The constitutional infirmity inherent in proceedings conducted under such circumstances is not affected by the fact that the attorney with dual and irreconcilable loyalties is privately employed rather than court appointed."

Actually, as expressed in a California Appellate Court opinion in the case of *People v. Kerfoot*, 184 Cal. App. 2d 622, 7 Cal. Rptr. 674, it would be improper for an attorney representing defendants where a conflict does occur to disclose the facts of the same as this would violate his duty to preserve his client's confidence and would be contrary to Canon 37 of Canons of Professional Ethics of the American Bar Association.

The error committed by the court herein is clear beyond question.

3. The Planted Police Controlled Evidence Was "Fruit From the Poisonous Tree" and Should Not Have Been Admitted.

The government takes a different view of the evidence on this matter than do the appellants. However,

there can be no quarrel that the following are facts, clearly shown in the record.

(1) The police and F.B.I. had physical possession of Exhibits 14-B thru 14-I (truck license plate, manila envelopes and small metal ID tags from a truck) from late afternoon until sometime after ten o'clock at night, photographing and marking them at the police lab for two or three hours. [Tr. p. 463, lines 1-5; p. 485, lines 1-5; p. 490, line 25, to p. 491, line 3; p. 503, lines 3-5; p. 512, lines 1-18; p. 514, lines 2-6.]

(2) These exhibits were then placed in the hands of the agent for the police. Mr. Buehler under a plan which the police had set up with Mr. Buehler to contact Mr. Chesney, to arrange to meet with him, to place the same in the hands of Mr. Chesney and simultaneously arrest him. [Tr. p. 485, line 1, to p. 486, line 15; p. 487, line 19, to p. 488, line 4; p. 513, line 14, to p. 519, line 25.]

(3) There was no evidence that Mr. Chesney had ever seen the exhibits before and he did not open the envelopes containing them prior to his arrest. [Tr. p. 473, lines 1-9; p. 519, lines 20-25.]

(4) At the time of arrest Mr. Chesney was committing no offense.

It is obvious, therefore, that at all times the police had the evidence in their possession and control, if they believed that Mr. Chesney had committed a felony (based on their 3 to 4 hours of examining the exhibits) they could have obtained a warrant for his arrest or they could have arrested him on some charge which they believed to be supported by the exhibits they had.

However, that was not their purpose. Their purpose was to plant that which they had already in their possession and had photographed and marked, into the colorable possession of Mr. Chesney (of material he

never had seen) and arrest him simultaneous SO THAT THEY COULD USE SUCH PLANTED POSSESSION AS EVIDENCE FROM WHICH A JURY WOULD INFER GUILT.

Couple this "illegal" police action with the instruction given by the Court (over objection) that guilt could be inferred from possession, and it is clear that the defendant's constitutional rights have been effectively circumvented.

The government argues that the police were no more than alert bystanders, watching the "shots" called by Chesney. Such is not the fact. The evidence is to the contrary.

Mr. Buehler delivered the bag containing the exhibits which he had gotten from a third party to the police at their direction. The police and FBI then took the material and spent three or four hours at the police lab photographing and marking the same. The police then delivered the material back to Mr. Buehler, set up a prearranged plan with him and instructed him to contact Mr. Chesney.

Mr. Chesney had already gone home and retired and it was Mr. Buehler, at the police direction, that brought Mr. Chesney to the prearranged location where the planting of the poisonous fruit was accomplished by the police.

The police officer who testified as to the arrest and as to the exhibits was asked if he had suggested to Mr. Buehler that he call Mr. Chesney and after some stalling the court asked him directly, . . . "did you tell Buehler to call Chesney" after which the officer said "Yes sir" and stated . . . "To the best of my recollection, I told him to proceed with the original plan." [Tr. p. 513, lines 3-24.]

The police told Mr. Buehler to proceed to the location. [Tr. p. 515, line 21.]

Thus, this was not an arrangement which was initiated by Chesney. The program initiated by Chesney had fallen through due to police intervention. It was the police and the police alone who initiated this meeting so that they could "plant" these items never seen by Mr. Chesney on Mr. Chesney and simultaneously arrest him therefor so that the same could be used as evidence to infer guilt.

By such "police state" methods, police suspicions coupled with police action are converted into "evidence" without any foundation or basis. When this activity is followed, as in this case, by the intervention of the Court stating to the jury that unless the defendant explains that "possession" (and in effect waives his privilege not to testify) they may "find" him guilty, the fundamental precepts of fair play are destroyed and the Constitutional rights of the defendants obliterated.

As it is clearly established that an arrest may not be used as a pretext to search for evidence (*United States v. Lefkowitz*, 285 U.S. 452, 467, 52 S. Ct. 420, 424; *People v. Haven*, 59 Cal. 2d 686, 31 Cal. Rptr. 47) certainly by the same reasoning an arrest cannot be used as an incident to and as a pretext for tying one into police possessed and controlled evidence.

The government claims in its brief that appellants cannot make mention of the fact that the arrest was illegal because they contend that there was not a specific objection on this ground at the trial. They cite in support of such contention the case of *Toland v. U.S.*, 365 F. 2d 304. The case does not so hold.

In the *Toland* case there was no objection of any kind made at time of trial and error was claimed for the first time on appeal. In the present case strenuous objection was made and repeated throughout the trial in the broadest form that it could possibly be done.

Such exacting technicalities are not favored in the modern jurisprudence procedure.

The objection was made upon the ground that there was not sufficient foundation that it actually was an entrapment procedure that the police had set up, that the evidence was therefore irrelevant and immaterial. [Tr. pp. 491, 492, 493 and 494.]

Thus, it was clearly brought to the court's attention that the planting of evidence and simultaneous arrest of Mr. Chesney was improper and afforded no foundation for an introduction of the evidence.

The government argues that the police were arresting based on a reliable informant and were merely intercepting.

As pointed out above, this is not a fact as Mr. Buehler was acting at all times after the material which he had gotten from a third party had been photographed by the police, under the direction and control of the police. It was at the police direction that he made the arrangements. The police, therefore, planned, controlled and supervised the whole arrangement and the arrest was merely a pretext to use the exhibits which otherwise had no foundation, in evidence against Chesney. Is an illegal act by the police to be judged by a different standard than those of others?

4. As the Search of the Vehicle in Which Defendant Glavin Was Riding Was Exploratory and Preceded the Arrest the Motion to Suppress Should Have Been Granted.

The government has devoted its reply on this point primarily to a recitation of some of the highlights of statements of their witnesses only. The facts stated by Roger Lee Glavin in his affidavit to support such motion and the items in the testimony of the government's witnesses which support such statements have been passed by.

The affidavit of Mr. Glavin in support of the motion to suppress [Clk. Tr. p. 14] points out that when the truck in which he was riding driven by Mr. Rexus pulled into a weight station in Ventura County for a

routine check that the Highway Patrol motioned the vehicle to a parking area away from the scales and weight station and that the officers instructed Glavin and the driver to get out of the truck, to produce the vehicle registration and to stand apart from the vehicle.

At this time the officer and individual under their jurisdiction started an intensive and detailed examination of the trailer and the truck getting under the trailer with a wire brush and brushing off with a steel wire brush areas of the frame of the trailer and used the wire brush underneath the truck also brushing away material on the two rear axels apparently searching for numbers or identification marks of some kind.

This procedure was then followed to the area underneath the transmission with the Police standing beside this man checking and brushing off areas around the transmission. The individual then took his notebook and wrote something down and then appeared to go to a telephone booth to make a phone call and then returned to the vehicle and began to examine it further.

The officers then instructed Mr. Glavin to raise the cab of the truck which Mr. Glavin did. An examination was then made of the engine and the fuel pump utilizing the steel brush as before.

This was followed by an examination of the front axel brushing off and writing down serial numbers from the axel. The individual who was under the police direction then left for a moment and returned with a can of what appeared to be paint remover and a rag. This was applied to the frame of the truck and after applications the paint in the area where this had been applied did raise up and after several applications it was removed.

The officers were called over to examine this and to look at it and also to photograph it. Following this, Mr. Glavin was directed to lower the cab.

The police and the individual under their control then searched the interior of the truck cab and removed therefrom all papers, documents, lists and items which belonged to Mr. Glavin including the removal of his suitcase and searching it.

Included among the items removed were receipts for fuel purchase, tickets, cash fuel receipts and a statement made by Mr. Glavin to an insurance company in El Paso, truck leases, driver's logs, telegrams, permits and some papers with the truck manufacturer's assembly parts list. A few minutes following this search, the police officers announced that Mr. Glavin and Mr. Rexus were under arrest.

As pointed out in the opening brief, the officer admitted on cross-examination that the information upon which he made the arrest was that Mr. Ross who was searching the vehicle under his surveillance showed him the brass plate in the cab which corresponded to a number he had in a notebook. [Rep. Tr. p. 284, lines 12-17.]

This clearly corroborates the statement of Mr. Glavin of the exploratory search and the arrest which followed as a result of the fruits of such illegal search.

The cases as cited in appellants' opening brief clearly points out that such a procedure is not permitted and that an arrest is not justified by what a search discloses.

Henry v. United States, 361 U.S. 98, 80 S. Ct. 168.

5. The Admission Without Foundation of Hearsay Documents Against Defendant Chesney Was Prejudicial Error.

In its attempt to show this court that there was some remote foundation for the introduction of the hearsay documents [Ex. 9A and Ex. 12E] against defendant Chesney, the government in reviewing this transaction has not fairly stated the evidence. Moreover, that which they have stated does on its face disclose error by the court.

The Exhibit 9A which appeared to be a receipt for the purchase of truck parts having the name of "Chesney Truck" on it had no foundation for its use against Mr. Chesney. It was not established by any separate or other evidence that the name "Chesney" referred to thereon was the defendant herein. Apparently, the only reason the court left it in was that it bore a name—without other connection—which happened to be the last name of defendant Chesney.

The government states that counsel for the appellant admits that this document was established by some foundation as being from Chesney's firm. Such is not the fact. The statement referred to is taken out of context and only upon reading the whole argument presented by counsel for appellants can the true effect of the statement be seen.

The court had just commented that he was going to admit this and that Chesney could rebut it if he wished and had said something about this is a transaction from Chesney's firm [Tr. p. 338 commencing on line 16].

Counsel for the appellant replied to the court on the court's own assumption that it was established as being from Chesney's firm and then went on to state that Chesney runs a manufacturing plant and that the name

on this paper was not Chesney's name and that it would indicate to appellant because his knowledge of Chesney's firm that it was not by Chesney because Chesney's firms were Chesney, Inc., and Chesney Tool and Engineering, Inc. That, therefore, there was no establishment that the term "Chesney Truck" related to this Chesney. [Rep. Tr. p. 342, lines 9-18.]

As pointed out to the court anyone could use another's name or use a name which embodied the surname of any person and unless some foundation were laid to show that Defendant had such a firm or that Defendant in fact had used such a name, to admit in evidence such a paper not obtained from such a defendant, was prejudicial error.

The government in attempting to show some connection between Chesney and the transaction relating to the truck and to show a connection or foundation for the introduction of Exhibits 12E (gasoline receipts charged to a credit card account bearing the name of Robert L. Chesney) referred to testimony of Mr. William West who had testified of talking to Mr. Chesney and Mr. Leon Glavin about renting a shop from him.

What the government did not bring out and what it did gloss over was that Mr. Chesney had spoken to him about the possibility of three phase power in the place not being enough to operate machinery and welding equipment, that Mr. Chesney had told him that he was interested in putting in a welder and some machinery and the place would have to have sufficient power to carry them.

This testimony is consistent with Mr. Chesney's manufacturing business and certainly shows that Mr. Chesney's connection with the transaction is not tied

up sufficient to find a basis for introducing these gasoline tickets taken from Mr. Roger Glavin's truck and not shown that such gasoline credit card was that of Mr. Chesney or that it was used with his knowledge or permission or consent.

The government mentioned an item which it is contended also was error, *i.e.*, that after the conversation between Mr. Leon Glavin and Mr. Chesney and Mr. West that Mr. Leon Glavin later returned and out of the presence of Mr. Chesney told Mr. West that he and Mr. Chesney *were partners in a business*, that they had another tractor which Mr. Glavin's brother was driving and that they had bought two trucks new. [Rep. Tr. p. 390, line 15, to p. 392, line 14.]

There was strenuous objection made to this testimony (and a motion to strike) it being pointed out to the court that proof of partnership or agency cannot be proved by extrajudicial expressions or any expressions of an agency outside of the hearing of or outside of the other agent or so-called principal, that it would be hearsay. [Tr. p. 389, line 4, to p. 391, line 15.]

The court, nevertheless, overruled this objection and admitted the evidence without any foundation and now the government seeks to rely upon this improperly admitted evidence as showing some basis for connection with Mr. Chesney on which to rest the foundation for the admission of the Exhibits 9A and 12E.

The declaration of one person made out of the presence of another as to the fact of partnership between him and that other person is inadmissible. *Easterly v. Bassignano*, 20 Cal. 489, *Vanderhurst, etc. v. DeWitt*, 95 Cal. 57, 30 Pac. 94, *Selinas v. DeWitt*, 97 Cal. 78, 31 Pac. 744.

Thus, the sought for connecting foundation is itself incompetent and the error is merely compounded. No foundation existed for the introduction of these documents against appellant Chesney and the court erred in so admitting them.

Conclusion.

It is respectfully submitted that the instruction given by the court that the jury could find guilt from possession of stolen items unless explained by defendants overruled their presumption of innocence and deprived them to their right to remain silent and suffer no penalty therefrom; that the court in forcing the two defendants to proceed to trial represented by a single attorney when advised that there appeared to be a conflict of interest and that one of the defendants did not wish such counsel to represent him denied to both appellants the effective assistance of counsel guaranteed by the Sixth Amendment; that the admission of a police controlled evidence which was planted by the police under a ruse wherein an arrest was used as a pretext therefor was prejudicial error; that as the evidence obtained from the truck in which Mr. Glavin was riding was found as a result of an exploratory search prior to arrest and arrest resulted from such search, the motion to suppress should have been granted and the evidence not admitted; and, the admission without foundation of the hearsay documents [Ex 9A and Ex. 12E] against Mr. Chesney was prejudicial error so that the judgments of conviction in this matter should be reversed and appropriate relief granted.

Respectfully submitted,

G. G. BAUMEN,
Attorney for Appellants.

Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

G. G. BAUMEN,



N O. 2 1 3 7 4

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APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

FILED

AUG 7 1967

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I

JURISDICTIONAL STATEMENT

On May 25, 1966, a three count indictment was returned by the Grand Jury for the Southern District of California [C. T. 2-4]. ^{1/}

The first count charged that on or about March 21, 1966, appellant Roger Lee Glavin transported a stolen 1966 International Harvester truck in interstate commerce from Los Angeles, California to Vero Beach, Florida, knowing said vehicle to have

^{1/} C. T. refers to Clerk's Transcript of Record.

been stolen. Further, appellant Robert Loring Chesney and defendant Leon Leroy Glavin aided, abetted, counseled, induced and procured the commission of the above offense.

The second count charged that on or about April 15, 1966, appellant Roger Lee Glavin transported another stolen 1966 International Harvester truck in interstate commerce from Los Angeles, California to Lima, Ohio, knowing said vehicle to have been stolen. Further, appellant Robert Loring Chesney and defendant Leon Leroy Glavin aided, abetted, counseled, induced and procured the commission of the above offense.

The third count charged that on or about April 15, 1966, appellant Roger Lee Glavin transported a 1962 Highway refrigerated trailer, of a value of more than \$5,000 in interstate commerce from Los Angeles, California to Lima, Ohio, which trailer had been stolen as the defendant well knew.

On June 6, 1966, appellant Roger Lee Glavin appeared with his retained counsel G. G. Bauman, was arraigned and entered a plea of not guilty to all counts of the indictment [C. T. 5].

On June 6, 1966, appellant Robert Loring Chesney appeared with his retained counsel G. G. Bauman, was arraigned and entered a plea of not guilty to all counts of the indictment [C. T. 5].

On June 6, 1966, Jerome Glaser was appointed to represent Leon Glavin, who was arraigned and entered a plea of not guilty to the indictment [C. T. 5].

The jury was impaneled on June 27, 1966 [C. T. 6]. Trial was held on June 27, 28, 29 and 30, 1966 [C. T. 6, 19-21]. On

June 30, 1966, the appellants and defendant were found guilty as charged in the indictment [C. T. 21].

On July 12, 1966, appellant Roger Lee Glavin was committed to the custody of the Attorney General for a period of five years on each of Counts One, Two and Three of the indictment. The sentences were to run concurrently [C. T. 30].

On July 12, 1966, appellant Robert Loring Chesney was committed to the custody of the Attorney General for a period of five years on each of Counts One and Two of the indictment. The sentences were to run concurrently [C. T. 31].

Appellants filed timely Notice of Appeal on July 13, 1966 [C. T. 32].

The offenses occurred in the Southern District of California, Central Division. The District Court had jurisdiction by virtue of Title 18, United States Code, Section 3231, and Title 18, United States Code, Sections 2312, 2314 and 2. This Court has jurisdiction to entertain this appeal under the provisions of Title 28, United States Code, Sections 1291 and 1294.

II

STATUTE INVOLVED

Title 18, United States Code, Section 2312 provides:

"Whoever transports in interstate or foreign commerce a motor vehicle . . . , knowing the same to have been stolen, shall be fined not more than

\$5,000 or imprisoned not more than five years,
or both."

Title 18, United States Code, Section 2314 provides:

"Whoever transports in interstate . . .
commerce any goods, wares, merchandise . . . of
the value of \$5,000 or more, knowing the same to
have been stolen . . . shall be fined not more than
\$10,000 or imprisoned not more than 10 years, or
both."

Title 18, United States Code, Section 2 provides:

"Whoever commits an offense against the
United States, or aids, abets, counsels, commands,
induces, or procures its commission, is a principal."

III

STATEMENT OF FACTS

The first working day in March 1966 an inventory was
taken of trucks located at the Montebello Branch Office of Inter-
national Harvester Corporation. The inventory disclosed that a
new International Harvester truck with a wheel base of 212 inches,
10 wheels, and powered by a Cummins diesel engine was missing
[R. T. 11-12]. ^{2/} (A 212" wheel base is a long wheelbase truck
[R. T. 89].) Investigation disclosed that the last time the truck

^{2/} R. T. refers to Reporter's Transcript.

was seen on the premises was February 9, 1966 [R. T. 21]. The missing International tractor was identified by chassis No. W-1446 H and engine number 440304 [R. T. 16, 52]. The chassis contained the following component parts: Forward Rear Axle No. 5023-X, Rear Rear Axle No. 5039, and cab number W-1446-H [R. T. 55-56]. The engine was fitted with fuel pump No. 357822 [R. T. 161].

During the first part of February 1966 Roger Glavin rented a garage in North Hollywood, California using the name John L. Wilson [R. T. 72-74, 84]. Shortly thereafter Roger Glavin brought a new 1966 International Harvester truck to the garage. The truck was white with a black frame and had a long wheelbase. In order to get the truck into the garage it was necessary for Glavin to cut three feet off the back rails [R. T. 75]. A Mr. Hellinger, who had a shop in the same vicinity, observed Glavin and other individuals working on this truck on various occasions [R. T. 72, 76]. Mr. Hellinger observed that a fifth wheel was placed on the truck and that the air cleaner and exhaust system was altered [R. T. 76, 79]. One evening Mr. Hellinger went down to the building and observed three people working around the vicinity of the frame of the truck, Roger Glavin, Leon Glavin and Robert Loring Chesney [R. T. 76-78, 132, 149]. Roger Glavin and Leon Glavin were standing while Robert Loring Chesney was down at the frame of the truck [R. T. 149]. He saw sanding tools in the vicinity of the frame. Roger Glavin told him that the Department of Motor Vehicles had given him the wrong numbers and they had

to change the existing ones [R. T. 90-91]. Later Roger Glavin and Leon Glavin rented a compressor and painted the truck red and white [R. T. 79-80]. Before the end of the month, Roger Glavin had taken the truck and left [R. T. 80].

In late February and March of 1966 Mr. Abraham Carmody was a partner in the Western Fruit Express Company. Western Fruit Express was a company engaged in hauling produce across the country. Western Fruit Express would enter into agreements with truck drivers whereby the drivers would furnish their own vehicles and Western Fruit Express would furnish trailers and arrange hauling jobs [R. T. 223-224].

During the first part of March 1966 Roger Glavin went to Western Fruit Express and inquired about a job hauling freight with his truck. He had a red and white 1966 International Harvester truck with a long wheelbase [R. T. 224-225]. Roger Glavin entered into an employment agreement with Western Fruit Express and drove a load from Los Angeles to Vero Beach, Florida [R. T. 226-230, 301]. He picked up a load in Vero Beach, Florida and was proceeding back to California when he got into a wreck in Texas. Since the trailer was damaged he put the produce in cold storage and brought the truck and trailer back to California [R. T. 230]. On this trip for Western Fruit Express appellant Glavin drove the long wheelbase red and white International truck. This truck had license No. X84086 [R. T. 230, 233-235].

On April 12, 1966 an inventory was taken of the trucks located at the Glendale Branch of the International Harvester

Corporation [R. T. 43]. The inventories are generally taken at one week intervals [R. T. 41]. The inventory disclosed that a 1966 International Harvester 3-axle truck with a diesel engine and an air conditioner was missing [R. T. 32]. The missing International Harvester truck was identified by serial number 6821 and engine number 481940 [R. T. 33]. Further, chassis number 6821 included the following competent parts: forward rear axle 23441, rear rear axle 22845 and cab number A 47271 [R. T. 58-60]. All efforts to locate this particular truck failed [R. T. 36].

Mr. Detlaf M. Simon is president of Hauling Equipment, Inc. His company sells new and used semi-trailers and it owned a 40-foot 1962 Highway refrigerated trailer with a value of \$6,000 [R. T. 180-181]. The trailer had a transicold diesel powered refrigerator unit with Serial Number 8421 and a small door on the curb side [R. T. 183-185]. On April 9, 1966 the above described trailer disappeared from the sales lot of Hauling Equipment, Inc. [R. T. 182].

On April 10, 1966, Bazil B. Buehler, an acquaintance of both appellants and Leon Glavin, went to Leon Glavin's house [R. T. 455]. When he arrived he observed Roger Glavin and Robert Loring Chesney working on a large black and white truck. Both appellants were preparing the truck for painting [R. T. 455]. Appellant Chesney told Beuhler that he was not a good painter and offered to pay Beuhler to paint the truck. Beuhler refused indicating that he didn't have time [R. T. 457]. The truck was basically the same type as another truck he had seen at Leon

Glavin's house [R. T. 458].

Larry Rexius is a truck driver [R. T. 42]. On April 12, 1966 Leon Glavin came to a gas station where Rexius was talking to a friend and inquired if anyone was looking for a job [R. T. 243]. The job was as a driver hauling produce with his brother Roger Glavin [R. T. 244-245]. Rexius went to work for Roger Glavin and on April 14, 1966 left on a haul from Los Angeles, California to Lima, Ohio [R. T. 242, 252]. After the load was delivered in Ohio they picked up another load and returned to California [R. T. 252-253]. The trip was made in a two tone red and white 1966 International Harvester truck with an air conditioner and short wheelbase [R. T. 249]. The truck towed a 40-foot 1962 Highway trailer with a transcold unit [R. T. 249-250].

Mr. William West is a self-employed truck repairman working in a shop complex located at 11133 San Fernando Road, San Fernando, California [R. T. 385]. In April of 1966 Leon Glavin and Robert Loring Chesney approached him with regard to renting one of the shops in that complex [R. T. 386]. Leon Glavin said they had a truck they wanted to store until they obtained a permit [R. T. 387]. Robert Loring Chesney inquired as to the source and amount of electrical power and said that they didn't know whether they would keep the shop long enough to move their welder and machinery in as they might move to Los Angeles where the work was located [R. T. 387]. Later Leon Glavin brought the long wheelbase truck down to the shop [R. T. 388]. He indicated that he and Chesney were partners in the business and had two trucks

[R. T. 390]. Further that one of the trucks was on a trip back east with his brother [R. T. 392]. Leon Glavin also asked if Mr. West could shorten the wheelbase on this long wheelbase tractor [R. T. 392].

Robert Gibson is a sergeant with the Los Angeles Police Department [R. T. 292]. He was working on the theft of two 1966 International Harvester trucks in the Los Angeles area. On May 2, 1966 at 9:30 A.M., he observed a long wheelbase 1966 International truck in front of an apartment at 6034-1/2 Vineland Avenue. He walked up to this International truck and by looking between the front fender and tire of the vehicle he was able to observe that there was no identification plate on the rear of the engine [R. T. 292]. Further, he saw that the engine had a cast date of 3/5/65 and fuel pump number 357822. He then walked away from the truck and went back and met his partner George Moeller and Lyman Ross of the National Auto Theft Bureau [R. T. 291, 283]. They waited for Mr. Kendrick of International Harvester to arrive with the fuel pump number off the truck that was stolen at Montebello. When Mr. Kendrick arrived with the fuel pump number a check disclosed that it was the same number as that which Sergeant Gibson had viewed on the truck [R. T. 293-294]. Mr. Kendrick then left and the other three individuals proceeded to drive one block away from the truck. They then parked and kept the truck under observation [R. T. 294]. At approximately 6:30 P.M., Leon Glavin came out of an apartment, got into the truck and drove away. Leon Glavin was followed by a Basil B. Beuhler in a 1964 Comet

[R. T. 294]. These two individuals were followed to 11333 San Fernando Road, San Fernando. The door to one of the garages was opened and Leon Glavin was about to get back into the truck when he was placed under arrest [R. T. 295]. A search of the vehicle disclosed the following information and exhibits:

1. Exhibit 9-A, which was found in the cab of the truck and is a receipt from Motor Truck Distributor Company for truck parts sold to a Chesney truck [R. T. 297-298, Exhibit 9-A].
2. Exhibit 9-B, which is a Western Fruit Express Trip Report on a trip driven by Roger Glavin. It shows a truck leaving from Los Angeles, California and going to Florida [R. T. 301].
3. Exhibit 9-C which is a work order from the Cummins Diesel Sales Corporation. The work ordered was to tune the engine and check fuel pump number 357822. The work order indicates that the performed repairs were made in either North or South Carolina [R. T. 305].
4. Mr. Kendrick returned and he along with Lyman Ross examined the truck. They found that the air cleaner and exhaust system had been altered; the chassis number, cab number, engine number and turbocharge number plates had all been removed; and the frame number had been altered [R. T. 364-366]. The rear rear axle had serial

number 5089 whereas the truck taken from Montebello had 5039 [R. T. 326, 330]. The number "8" appeared to have been tampered with [R. T. 331].

Leon Glavin was held in custody but Basil Beuhler was released [R. T. 460].

On May 3, 1966 Larry Rexus and Roger Glavin arrived back in California. Roger Glavin drove the truck to a machine shop in Glendale, California [R. T. 253]. Roger Glavin got out of the truck and went into the machine shop where he had a conversation with appellant Chesney [R. T. 253-255]. Roger Glavin and Rexus left the machine shop in the truck and proceeded towards San Francisco on the Ventura Freeway [R. T. 255].

Mr. Lyman Ross is a special agent employed by the Los Angeles office of the National Auto Theft Bureau. He was participating in the investigation of the two stolen 1966 International Harvester trucks and was present when Leon Glavin was arrested [R. T. 108-09]. On May 3, 1966, at 4:45 P. M., Mr. Ross was proceeding southbound on the Ventura Freeway when he observed a 1966 International Harvester truck pulling a trailer in a northbound direction on the same freeway. The truck had the same color combination as the one which was seized from Leon Glavin the previous night. The door had a name plate with the name Western Fruit Express. There was a refrigeration unit mounted on the cab [R. T. 109, 112]. Mr. Ross made a U-turn and followed the truck up to Montalvo where it turned into a service road. He

drove by the trailer and observed that it was a Highway trailer with no license plate. Mr. Ross stopped about 150 yards from the truck and radioed the California Highway Patrol and requested that an officer meet him at that location [R. T. 111]. Officer Imboden of the California Highway Patrol responded to the call at 5:55 P. M. [R. T. 279]. Mr. Ross told Officer Imboden that he had reason to believe that the truck and trailer parked ahead of them was stolen. He explained that one International truck had been taken from the Montebello Branch of International Harvester and one other International Harvester truck had been taken from the Glendale Branch of International Harvester; that the Montebello truck had been recovered the night before from a Leon Glavin and this second truck was painted with the same color combination as the recovered truck. He stated that the trailer was similar to one stolen in East Los Angeles [R. T. 111, 406].

Officer Imboden and Mr. Ross followed the truck to the Montalvo Highway Patrol Truck Scales. At approximately 6:25 P. M. the truck pulled into the scales and was pulled over to a parking area [R. T. 112]. Officer Imboden approached the truck and asked appellant Roger Glavin for the registration papers. He proceeded to check the trailer and observed there was no license plate affixed thereto. The truck had a front license plate but no rear license plate and the front plate had no quarterly registration. The appellant Roger Glavin handed Officer Imboden a blue suspense receipt that showed no description of the vehicle at all [R. T. 280]. At this time Mr. Ross walked over to the left hand door of the cab

and opened it. He observed the serial plate that was attached to the outer edge of the left hand door and saw that the cab serial number was A-47271. Mr. Ross checked this number against the serial number he had in his possession for the Glendale truck and found them to be the same [R. T. 112]. Mr. Ross then called Officer Imboden over to the left side of the truck from the right side where he was talking to appellant Glavin. He pointed out the brass identification plate on the door to Officer Imboden and showed him a number in a book he had in his possession. He told Officer Imboden that this number corresponded to the number on the truck that was stolen. Officer Imboden compared the two numbers and observing that they were the same then placed Roger Glavin under arrest [R. T. 280-281]. This arrest took place approximately 15 minutes after the truck pulled into the scales [R. T. 113].

The truck was then searched and the search disclosed the following documents and information:

1. The truck bore front rear axle number 28441.
The truck that was taken from Glendale had axle number 23441. The "8" was much heavier than the remainder of the numbers [R. T. 414-415].
2. The Highway Trailer had a Transicold Refrigeration unit bearing serial number 8421 [R. T. 419].
3. Exhibit 12-E thirteen receipts for diesel fuel.
Ten of the receipts were charge tickets and bore a credit card number and the name Robert L. Chesney [R. T. 420, 445-446].

4. A Drivers Log Record in the name Roger Glavin.
This log record shows a trip from Los Angeles,
California to Lima, Ohio [R. T. 434-436].

After the truck was examined it was placed in storage at Owl Storage Yard in Oxnard [R. T. 281]. Mr. Simons went to Owl Storage and conducted an extensive examination of the trailer. He came to the conclusion that this was the trailer taken from his sales lot on April 6, 1966 [R. T. 189-191].

Shortly before 2:00 on May 3, 1966, Robert Loring Chesney telephoned Basil Buehler at his home [R. T. 459-461]. He asked Mr. Buehler what had happened the night before. Buehler explained that he and Leon Glavin were arrested for grand theft and that he was released and Leon was held. Buehler testified as follows concerning what he was told by Chesney:

"That Roger was here, this was his words,
Roger was here but Roger didn't want to come over
to the house, meaning Lee's house, and he didn't
want to come over, and asked me if I would get a
package from the house for him, he said it was kind
of important for him." [R. T. 461, lines 8-16].

Buehler testified that Chesney told him both he and Roger Glavin didn't want to go to Leon's house [R. T. 472]. Chesney went on to explain that the package contained envelopes, license tags, pink slips and papers [R. T. 461]. After this conversation Buehler called Sergeant Moeller of the Los Angeles Police Department and explained what had happened. Sergeant Moeller told

Buehler to go ahead and obtain the package and then call him.

Buehler then went back to work [R. T. 461].

On May 3, 1966 Kittia Buehler went to the home of Leon Glavin to pick up her son [R. T. 449]. Leon Glavin's wife, Barbara Glavin, gave her a paper bag and asked her to take it home. She took it back to her house and put it in a closet [R. T. 449-450]. Later that day Robert Loring Chesney called and asked for her husband's phone number which she gave to him [R. T. 452].

Shortly after 5:30 P. M. Bazil Buehler returned home from work. He told his wife that he had to go down to Leon Glavin's and get some things and take them to Chesney's machine shop. His wife showed him a bag of articles she had received earlier that day from Barbara Glavin [R. T. 461]. He looked in the bag and observed 4 manila folders, a license tag and an aluminum plate [R. T. 462].

Mr. Buehler left his house and drove to a pay phone and called the police. He explained to them that he had the items Chesney had requested and they arranged a meeting. He met police Officers Moeller and Gibson and an FBI agent at the corner of San Fernando Road and Colorado Street [R. T. 462]. The items were taken down to the Los Angeles Police Department where they were photographed and labeled [R. T. 462, 485]. The items were then returned to Buehler in their original form.

Mr. Buehler proceeded to Robert Loring Chesney's place of business followed by the police officers. When he could not locate Chesney he drove to a phone booth in a gas station [R. T. 463, 475].

The police officers arrived and Buehler informed them that he was going to call Chesney and they agreed [R. T. 475, 513]. While Officer Moeller stood in the doorway of the phone booth, Buehler called Chesney at home [R. T. 514]. Buehler told Chesney where he was located and Chesney said it was rather late to come all the way down to the machine shop. Chesney asked Buehler if he knew where the Greyhound Bus Depot in North Hollywood was located. Chesney said that he would meet him there and would be driving a blue T-Bird [R. T. 463, 476]. Buehler related this conversation to Officer Moeller and then drove down to the bus terminal [R. T. 464, 515]. He parked his car and waited for a period of time. About 12:15 Chesney drove into the parking lot in a blue T-Bird and parked a short distance from Buehler's automobile. Chesney walked over to Buehler's automobile and Buehler opened the trunk of the car and gave him the bundle [R. T. 464, 517]. Chesney unwrapped the bundle and looked in and saw the license tags and packages [R. T. 480]. He said "he was glad to get it, because if it got into the wrong hands it would put them all behind bars" [R. T. 465, lines 2-6]. Chesney then turned and walked towards his car at which time he was placed under arrest and the package taken from his possession [R. T. 486].

Among the various items found in the package were the following:

1. A license plate bearing the number X84086 [R. T. 490].
2. Four manila envelopes. One bore the name

"Trailer" [R. T. 496], another the name "Checks" [R. T. 501], another the name "Truck" [R. T. 502 and the fourth the name "I. D. Plates" [R. T. 503].

3. One of the envelopes contained Cummins Engine I. D. Tag Number 481940 [R. T. 506]. This is the same engine number as the tractor taken from Glendale [R. T. 508].

IV

ERRORS SPECIFIED BY APPELLANT

The appellant has specified the following points on

appeal: 3/

1. Appellant's Constitutional Rights Denied by Jury Instruction Given.
2. Right to Adequate Assistance of Counsel Denied.
3. The Entrapment and "Deposit and Seizure" of Evidence on the Defendant Was Illegal, Rendering the Evidence Inadmissible.
4. There was Unlawful Search and Seizure Rendering Evidence Seized Inadmissible.
5. Admitting Hearsay Document Not Found in the Possession of the Defendant Against Whom Admitted and Without Any Foundation Connecting

Defendant Thereto was Prejudicial Error.

V

ARGUMENT

A. THE COURT PROPERLY INSTRUCTED
THE JURY THAT THEY MAY DRAW
CERTAIN INFERENCES FROM POSSES-
SION OF PROPERTY RECENTLY STOLEN.

We agree with appellants that an accused is innocent until proven guilty and that presumptions of guilt are violative of basic due process protections. However, the instruction given did not state a presumption of guilt but stated an inference which the jury was told was merely permissible.[R. T. 596-598]. Additionally, the appellant does not maintain the instruction was stated a presumption, but that it may have appeared to a jury to have stated a presumption.

The courts have long been aware of the differences between presumptions and inferences: presumptions demand conclusions, unless, of course, successfully rebutted; inference merely means that a conclusory jump from A to B is logically permissible but does not demand it. United States v. Gainey, 380 U.S. 63; Tot v. United States, 319 U.S. 463 (1943); Morandy v. United States, 170 F.2d 5 (9th Cir. 1948); Booth v. United States, 154 F.2d 73 (9th Cir. 1946).

The instruction given in the instant case involved an inference. In United States v. Gainey, supra, the charge to the

jury was as follows:

"Whenever on trial for violation of subsection (a)(4) the defendant is shown to have been at the site or place where, and at the time when, the business of a distiller or rectifier was no engaged in or carried on, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury)."

The court found that these words not only constituted an inference rather than a presumption, but were clearly understandable as such to the jury of laymen. The comparable part of the instruction in the case at hand follows:

"Possession of property recently stolen, if not satisfactorily explained, is ordinarily a circumstance from which the jury may reasonably draw the inference and find, in the light of surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen.

"And possession of property recently stolen, if not satisfactorily explained, is also ordinarily a circumstance from which the jury may reasonably draw the inference and find, in the light of surrounding circumstances shown by the evidence in the case,

that the person in possession not only knew it was stolen property, but also participated in some way in the theft of the property."

* * * * *

"If the jury should find beyond reasonable doubt from the evidence in the case that the International Tractor described in Count I of the indictment were stolen, and that while recently stolen, the property was in the possession of one of the accused, the jury would ordinarily be justified in drawing from those facts the inference, not only that the International tractor was possessed by the accused with knowledge that the property was stolen, but also that the accused participated in some way in the theft of the property, unless possession of the recently-stolen property by the accused is explained to the satisfaction of the jury by other facts and circumstances in the evidence in the case; and the same proviso applies in the case of the tractor in Count II."

* * * * *

"It is the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in the case warrant any inference which the law permits the jury to draw from the possession of recently-stolen property.

If any possession the accused may have had of recently-stolen property is consistent with innocence, the jury should acquit the accused."

More clearly than in Gainey, supra, the words here indicate that the conclusion is not mandatory, but only permissible. Specifically, "the jury may reasonably draw the inference and find"and" it is the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in the case warrant any inference which the law permits the jury to draw" is more clearly an inference than the comparable part in Gainey, supra. In addition, this instruction does not limit the jury to the sole consideration of the circumstance of finding in light of "all the facts and circumstances" here.

Further, the constitutionality of an inference of this type depends upon the rationality of the connection between the facts proved and the ultimate fact inferred. Tot v. United States, 319 U.S. 463, 466 (1943); United States v. Gainey, supra, at 66-67. The collective experience of the police and the courts, in California and elsewhere, has established that there is a strong connection between the possession of the stolen goods recently after a crime, and knowledge of the actual commission of the crime. This specific rational connection asserted herein has been found and sustained in Morandy v. United States, 170 F.2d 5, 6 (9th Cir. 1958), " . . . 'the law is that possession of the fruits of a crime recently after its commission, -- namely, here, the automobile, in the absence of an explanation justifying the

possession, warrants an inference pointing towards guilt. The inference fades as time elapses.' We think the instruction correctly stated the law. Affirmed."

Appellant also argues the instruction violates his Fifth Amendment rights. We submit the instruction does not curtail appellants' Fifth Amendment right not to testify, nor does it amount to an unconstitutional comment on his failure to testify. It puts no direct pressure on the appellants to testify. The instruction takes special care to remind the jury that appellants need not testify and that the incriminating circumstances may be explained by other means of presenting evidence.

"In considering whether possession of recently stolen property has been satisfactorily explained, the jury will bear in mind that in the exercise of Constitutional rights, the accused need not take the witness stand and testify. Possession may be satisfactorily explained through other circumstances, other evidence, independent of any testimony of the accused." [R. T. 598].

The trial court took special precaution to point out to the jury that exercise of the constitutional right leads to neither presumption nor inference of guilt.

"A defendant in a criminal case is not required to take the stand and testify. When he chooses this course of action, no presumption of guilt may be raised and no inference adverse to

him may be drawn from this fact by the jury. The defendant, having availed himself of this privilege, you are to draw no inference of guilt against him from it."

The entire instruction exhibits a heightened awareness of the seriousness of the jury's task. The court time and again stressed the right of the defendant not to testify and not to have this weigh against him; it stressed that the burden of proof to prove guilt beyond a reasonable doubt was always with the Government and was very high [R. T. 589, 599]; that reasonable doubt exists when the jurors are not convinced to a moral certainty that defendant is guilty [R. T. 595]; that evidence other than direct testimony from the defendant can dispel the inference; and that the jury is not to infer guilt from defendant's silence [R. T. 600]. These statements protecting defendant against the possibility of a jury presuming guilt from silence is diametrically opposed to the condemned comments offered by the court and prosecutor in Griffin v. California, 380 U.S. 609 (1965). We submit, in conclusion, that the judge gave an instruction designed to protect the defendants' fundamental Fifth Amendment rights against conscious and unconscious incursions on them by the court and the jury.

B. NEITHER APPELLANT WAS DENIED
 HIS SIXTH AMENDMENT RIGHTS TO
 ADEQUATE ASSISTANCE OF COUNSEL.

1. There Was No Abuse of Discretion
 By the Trial Judge in Denying
 Counsel's Motion to be Relieved
 From Representing Roger Glavin.
-

On the morning of trial, June 27, 1966, appellant's attorney, Mr. G. G. Bauman, indicated to the court that "it appears there may perhaps be a conflict of interest" in his representation, and asked to be relieved of representing Mr. Glavin. Judge Goodwin denied the motion on the grounds that appellants are entitled to a speedy trial, that the case has been prepared on both sides, and that the appellants had been out on bond since early in May, a sufficient time to secure the representation they desired [S. R. T. 2]. ^{4/} The court was aware that the estimated trial period was approximately 4 days; additionally, the government in fact called 17 witnesses, many of whom were in attendance to their own inconvenience having come from as far as Indiana.

The essential question regarding the trial judge's discretion in this case, is whether the mere mention of the possibility of a conflict in representation is automatically and absolutely sufficient to cause the trial judge to delay the trial and relieve counsel of his duty. A broad generalization to this effect may be

^{4/} S. R. T. refers to Supplemental Reporter's Transcript.

found in Glasser v. United States, 315 U.S. 60, 67, 62 S. Ct. 457 (1941). Yet in spite of this broad generalization by the Supreme Court, the majority could not divorce itself from an intensive investigation of the facts found in the record [pp. 72-75]. The record showed a conflict. We submit that the court in Glasser was primarily holding that in a close case, a motion to vacate because of the possibility of a conflict in representation cannot be decided merely on the discretionary foresight of the trial judge, but must be considered in light of the facts on the record.

Hayman v. United States, 205 F.2d 891, 894
(9th Cir. 1953);

See: Gardiner v. United States, 237 F. Supp. 692
(S. D. Texas 1964).

Further, we submit that the court in Glasser recognized that mere mention of a possible conflict of interest does not demand substitution of counsel. Action on the motion remains subject to judges discretion.

"Upon the trial judge rest the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. Speaking of the obligation of the trial court to preserve the right of jury trial for the accused, Mr. Justice Sutherland said that such duty 'is not to be discharged as a matter of rote, but with sound and advised discretion, with an eye to avoid undue departures from that mode of trial or from any of the essential

elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity. '

Patton v. United States, 281 U.S. 276, 312-313. "

Glasser v. United States, supra, at p. 71.

Therefore, the facts of the particular situation are apparently at the focus of the court's eye and attention, and the judge is not to grant or dismiss a motion "as a matter of rote", but is to view the situation at hand.

The court in reviewing the discretionary ruling should look to the facts available to the trial judge; the facts upon which he based his ruling.

If this Court should rule on the exercise of discretion by the trial judge without viewing the trial record, on grounds stated before, i. e., constitutional protection of a speedy trial, sufficient opportunity for appellants to obtain counsel of their choice, great inconvenience to the government and its witnesses, and the orderly administration of justice in the Federal Courts, then the trial judge was entirely within his discretion in refusing the sketchily phrased motion of appellants.

2. The Appellant Has Failed to Carry
 the Burden of Proving By a Pre-
 ponderance of the Evidence on the
 Record, That a Conflict of Interest
 Existed.
-

In both the motion before the trial judge, and here again on appeal, appellants have merely alleged a conflict of representation.

In neither instance have they pointed to a specific showing of this conflict, despite the generally accepted requirement that appellant do more than merely allege a violation of constitutional rights. The court in Daughtrey v. United States, 242 F. Supp. 771 (1964) sets forth the procedure to be followed in collaterally attacking a sentence on constitutional grounds. "On a motion to vacate sentence, the burden is on the petitioner to prove by the preponderance of the evidence, those contentions he sets forth as depriving him of his constitutional and lawful rights." And, ". . . in overcoming the presumption of regularity in a court proceeding, the defendant must set forth facts with sufficient particularity as to make them appear more than mere conclusions, thereby warranting their belief." Daughtrey v. United States, *supra*, at 774. Sanders v. United States, 373 U.S. 1, 5, 6 (1963); Rayborn v. United States, 251 F. 2d 950 (6th Cir. 1958); Hearn v. United States, 194 F. 2d 647 (7th Cir. 1952); United States v. Bostic, 206 F. Supp. 855 (D. C. Cir. 1962); Hayes v. United States, 208 F. Supp. 178, 182 (E. D. N. C. 1962). This procedure should likewise apply to a direct appeal on constitutional grounds.

We submit that where counsel has the facts beforehand and in the alternative the record before him, it is his duty to specify his complaint both for the trial judge and for this court and opposing counsel on appeal.

3) The Record Shows No Conflict of Interest.

We submit that the appellants were not denied the constitutional right to adequate assistance of counsel. The test of adequate

representation in light of a claim of conflict of interest was stated by this Court in Hayman v. United States, 205 F.2d 891 (9th Cir. 1953).

"Be that as it may, we look to the facts to see whether anything was done or whether there was any omission to do anything other than that which a competent and free-to-act lawyer would be justified in doing or in not doing." p. 894.

The only stated ground of conflict of interest was that Roger Glavin and his attorney did not agree on the manner of representation. Yet Roger Glavin was patently guilty - the evidence against him was overwhelming - the jury deliberated a mere 2-1/2 hours, a very short time considering the complexity of the case. It has been the experience of us all that a client and his lawyer do not always see eye to eye, yet that surely is not to indicate a conflict of interest or inadequate assistance of counsel. Mr. Baumen several times made motions to suppress evidence he felt prejudicial to his client, and examination of the witnesses was on a high level at all times.

Loring Chesney's defense was constructed about a different tactic. The evidence against him, although sufficient in the jury's consideration to convict, was not as full or as weighty. Using the Fifth Amendment right to its fullest extent, counsel attempted to maintain the presumption of innocence by insufficiency of evidence. But because the tactic failed, because the jury felt beyond a reasonable doubt and to a moral certainty that Mr. Chesney was

guilty, is not evidence of a conflict of interest.

We respectfully submit, with all deference paid to the fundamental importance of the constitutional protection to adequate assistance of counsel, that appellants have received the fullest protection our legal system affords, the protection and benefit of "vigorous, experienced and competent counsel at each stage of the proceedings". McDonald v. United States, 282 F.2d 737, 743 (9th Cir. 1960).

C. ADMISSION OF EVIDENCE FOUND IN
 THE POSSESSION OF DEFENDANT
 INCIDENT TO HIS ARREST WAS IN
 CONSONANCE WITH FOURTH AMEND-
 MENT GUARANTEES AND CONSTITUTED
 COURT ACCEPTED POLICE PRACTICE
 AND DUTY.

Appellants' lawyer has characterized the procedure involving the arrest of Robert Loring Chesney as "having some of the attributes of entrapment" that "shocks the sense of justice". We suggest that appellant cannot classify this as entrapment because it does not have the requisite elements and that the procedure is shocking only when recounted as appellant has on pages 18 and 19 of his Brief, which, we submit, is fundamentally different from the evidence in the record.

Entrapment is first described in Sorrells v. United States, 287 U.S. 435, 451 (1932) and more recently in Sherman v. United States, 356 U.S. 369 (1958), from which the following quotation comes at page 372:

"However, a different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute."

And further that,

" . . . the fact that the government agents merely afford opportunities or facilities for the commission of the offense does not constitute entrapment. Entrapment occurs only when the criminal conduct was 'the product of the creative activity of law enforcement officials. . . ."
(emphasis supplied by the Court.)

The idea of the transfer of the four envelopes from Leon Glavin's home to Robert Loring Chesney with Basil Buehler as the intermediary originated with Chesney and was told to Buehler by Chesney over the phone on May 3, 1966 [R. T. 456, 460].

"He [Chesney] said that Roger was here, this was his words, Roger was here but Roger didn't want to come over to the house, meaning Leon's house, and he [Chesney] didn't want to come over, and asked me if I would get a package from the house for him, he said it was kind of important to him." [R. T. 460].

This is corroborated on cross-examination [R. T. 472, lines 17-22]. It was Chesney, and not the police, who asked Buehler to do him the favor of going to Leon Glavin's house to get the packages to give to Chesney. It was in Chesney's mind, and not in the mind of the police, that the plan originated.

Appellants would have us believe that Chesney was ignorant of the contents of the packages and was doing Roger Glavin a favor by being the temporary repository of them. That this inference is partially unfounded in, shown above, and the claim that Chesney was ignorant of their content is negated by Bazil Buehler's testimony concerning the telephone conversation alluded to above.

"He said it was maybe one or two envelopes that were in a package.

He said it would be license tags and some papers and stuff, and he had a couple of pink slips, and to bring those also." [R. T. 460, 461, 473].

This information came into the hands of the police through the voluntary aid of Mr. Buehler. Buehler was arrested with Leon Glavin on the evening of May 2, 1966. Although Leon was held, Buehler was released because they believed that he was not connected with the crime. Subsequently, afraid of being dragged into the crime by Chesney, Buehler telephoned the police giving them the details of Chesney's phone call. The police, rather than being a motivating and creative force in this transfer of goods requested by Chesney, merely advised Buehler that he ought to

follow through with Chesney's instructions. They would take it from there [R. T. 461]. When the first meeting did not materialize, it was Buehler who informed the police that he would contact Chesney for another meeting, which he did [R. T. 475, 513]. It was this meeting that resulted in the transfer of the envelopes [R. T. 464, 517]. The whole process of transfer had originated with Chesney and was carried out primarily by him. At the very least, Chesney's ready compliance with what appellants' claim was the police's plan indicated a guilty mind and precludes any finding of entrapment. Roth v. United States, 270 F.2d 655 (8th Cir. 1959); Kivette v. United States, 230 F.2d 749 (5th Cir. 1956); Lathem v. United States, 259 F.2d 393 (5th Cir. 1958); Accardi v. United States, 257 F.2d 168 (5th Cir. 1958).

Throughout this chain of events, the police were no more than alert bystanders, watching the "shots" called by Chesney. Of course, they were kept aware of the whereabouts of the envelopes, but their possession amounted to a scant three hours while they photographed and labeled the items [R. T. 462, 485]. At all other times, the items were in the chain of possession of Leon Glavin, Barbara Glavin, Kittia Buehler and Robert Loring Chesney. The envelopes, were in dominion and control of these people; they had the ability to have done anything they wished with them, including destroy them. Except for a short lapse, exclusive physical control was in the unchecked and independent hands of the people within this chain.

Furthermore, nothing could have been gained by waiting

any longer. Possession was perfected by the transfer; in the period between Buehler's handing over the goods and Chesney's arrest, he had such dominion and control to do what he wished with them, such as throw them away. He chose not to. What he was going to do in the future with them is also irrelevant. Appellants may say that possession is relative to time, and is a question of degree. These legal niceties are more confusing than helpful -- when a man is holding incriminating evidence and has been vested with the power to do with them as he pleases, the sudden and rapid intervention of the police is not entrapment, but is the fulfillment of the duty of the police to society. The admission of relevant information gathered incident to a legal arrest is not a violation of the Fourth Amendment.

In addition, appellant seems to touch on the idea that the arrest was unlawful because there was no probable cause to suspect the recent commission of a crime [Brief, pp. 19-20]. We submit that the appellants may not raise this objection now because they failed to raise the objection on these grounds at trial. Toland v. United States, 365 F.2d 304 (9th Cir. 1966). The trial judge made extensive inquiry into the exact nature of the appellants' objection. The result was two objections on the ground of entrapment, the second ground being merely entrapment described in different phrases [R. T. 490-495].

However, if the court should find that appellants have raised this objection, we contend that there was probable cause for the arrest both with and without Chesney's possession of the

envelope. An arrest made on the basis of information given the police by a citizen or a reliable informer, if it establishes probable cause, is a legal arrest. Draper v. United States, 358 U.S. 307 (1959). This immediately raises two questions, the first concerning the reliability of Buehler and the second concerning probable cause to arrest.

Buehler was arrested with Roger Glavin. However, the police believed that he was actually an innocent bystander and released him without booking. In no way did the police consider him to be part of the crime. Of his own free will he called the police to tell them how Chesney had called and asked that he do him a favor. Although he was a little closer to the situation than is an ordinary citizen, that was all he was, because, in fact, he had nothing to gain by cooperating as he did.

However, if the court wishes to treat him as an informant, it should note that he was a reliable informer. A reliable informer is not solely one who has been proven reliable in the past; he may be one whose information bears itself out during the entire time it is being given. "There are actually two ways in which the information given by an informer can be proved 'reliable'. If 'X'

once tells police officer 'Y' that he has cause to believe some illegal act will take place, or some certain fact exists, and 'Y' subsequently finds out such statement of 'X' is true, thereafter 'Y' has some reason to trust and rely on the accuracy of informant 'X'." And "The second way . . . is actual appearance, at the time and place specified in such information . . . that was predicted". Jones v. United States, 326 F.2d 124, 128-139 (9th Cir. 1963). The court uses Draper v. United States, supra, as an example. In the instant case, the record shows verification of Buehler's accuracy and reliability on both methods. First, he called police and told them of Chesney's call and said that he expected several envelopes. He then got the envelopes in the generally predicted way. Further, he arranged a meeting with Chesney, and told police where it would be, when it would be, what kind of car Chesney would drive, and most importantly, that Chesney would take the envelopes of which all the parties knew the content. This accuracy in both instances easily meets the level of standards set forth by Draper and Jones, supra.

The question remains whether the police, accepting the reliability of this information, had probable cause to arrest. This depends on the knowledge of the police at the time of the arrest, and the natural and reasonable consequent suspicions that this knowledge would lead to. Draper v. United States, supra, at 313; Brinegar v. United States, 338 U.S. 160, 175. First, the police knew that two tractors and a trailer had been stolen and that certain plates and paper were removed and/or altered. Second,

they knew that Roger Glavin had been caught and arrested with a tractor and trailer and that Leon Glavin had been arrested the night before. Third, they knew of the telephone call of Chesney to Buehler and of the contents of the package. Everything that Buehler had told them about the packages and the favor he was to do for Chesney had worked out as Buehler said it would. That Buehler was doing a favor for Chesney in getting the material from the Glavins is an influential point towards the connection between the Glavins and Chesney. Chesney begins to look like an organizer of the scheme, having a finger in all these pots and some control over the scheme. Fourth, they knew of the telephone call of Buehler to Chesney to establish the second meeting place, and they also had the verification of finding Chesney at that pre-appointed spot. This evidence meets the requirements of probable cause to arrest Chesney for suspicion of grand theft. Sandez v. United States, 239 F.2d 239 (9th Cir. 1956); Bates v. United States, 352 F.2d 399 (9th Cir. 1965); Elkanich v. United States, 327 F.2d 417 (9th Cir. 1964), cert. denied 377 U.S. 917. Brinegar, supra; Draper, supra. That Chesney was arrested while in possession of the envelopes, of which, by Mr. and Mrs. Buehler's testimony, he knew the content, merely reinforces the existence of probable cause.

D. EVIDENCE TAKEN FROM ROGER
GLAVIN INCIDENTAL TO HIS
ARREST WAS PROPERLY ADMITTED.

On May 3, 1966, while participating in the investigation of two stolen 1966 International Harvester trucks, Lyman Ross, a special agent of the National Auto Theft Bureau, spotted a truck pulling a trailer northbound on the Ventura Freeway. The truck had the same color combination as the one seized from Leon Glavin the night before. On the door was printed Western Fruit Express. A refrigeration unit was mounted on the cab. Ross turned around, followed the truck as it entered a service road. He noticed the trailer had no license plate. He radioed the California Highway Patrol and requested an officer to meet him where he had stopped, about 150 yards behind the truck. When Officer Imboden arrived, Ross explained to him the suspicious circumstances. He told him that there was an International Harvester truck taken from the Montebello Branch of International Harvester and the Glendale Branch of International Harvester; that the Montebello truck had been recovered the night before but the Glendale truck was still out. Further, that the International Truck ahead of them was painted with the same color combination as the one seized the night before and the trailer it was towing was similar to one stolen in East Los Angeles [R. T. 111, 406].

When the truck pulled into the scales at Montalvo the driver was directed into a parking area [R. T. 112]. Officer Imboden approached the truck and asked Roger Glavin for the

registration papers. He proceeded to check the trailer and observed there was no license plate affixed thereto. The truck had a front license plate but no rear plate and the front plate had no quarterly registration [R. T. 280]. Roger Glavin handed Officer Imboden a blue suspense receipt which had no vehicle description.

Mr. Ross was viewing the other side of the truck from where Imboden and Glavin were talking. Mr. Ross opened the left hand door of the cab and observed the serial plate that was attached to the outer edge of the door. He saw that the number was A-47271. He checked this number against the serial number he had in his possession for the Glendale truck and found them to be the same [R. T. 112]. Mr. Ross then called Officer Imboden over to the left side of the truck. He pointed out the brass identification plate on the door and showed him the number that he had for the stolen Glendale truck. Officer Imboden compared the two numbers and observing that they were the same placed Roger Glavin under arrest [R. T. 280-281]. This arrest took place approximately 15 minutes after the truck pulled into the scales [R. T. 113].

The information supplied to the police officer by Lyman Ross, even if it had not been lawfully gotten, was admissible as evidence. The United States may use as evidence incriminating information made known to it by private individuals even if procured by a wrongful search of the accused's possessions. Burdeau v. McDowell, 256 U.S. 465 (1921); United States v. Goldberg, 330 F.2d 30 (3rd Cir. 1964). Lyman Ross is a private citizen in the

employ of a private investigating service which does work primarily for insurance companies. Although he has aided the police in the past, and his reliability is excellent, his contact with the police is only incidental to his primary employment. His search was as a private person and his disclosure to the police therefore fits within the Burdeau, supra, rule. It is admissible.

However, if the court believes that Mr. Ross' activities are such that he should be treated as an agent of the police, then we submit that the information that he turned up was fully admissible as evidence since it was gathered in the permissible activity of identifying the car more precisely.

In Cotton v. United States, 371 F.2d 385 (9th Cir. 1965), a police officer identified a stolen car more precisely by checking the serial number on the car door. He had asked Cotton if he could search the car, but neglected to advise him that he could refuse. In spite of this possible violation of Cotton's rights, the evidence thereby discovered, i. e., that this was a stolen car, was admissible. This Court there said, "But we are of the opinion that, when a policeman or a federal agent having jurisdiction has reasonable cause to believe that a car has been stolen, or has any other legitimate reason to identify a car, he may open a door to check the serial number, or open the hood to check the motor number, and that he need not obtain a warrant before doing so in a case where the car is already otherwise lawfully available to him."

Officer Imboden was operating within his lawfully assigned

area. He was within his physical jurisdiction. Based on the information of Lyman Ross, arguably acting as a police agent, Officer Imboden had reasonable cause to believe the truck and trailer were stolen or at the very least had legitimate reason to identify the truck. Finally, the truck was lawfully available to him, being stopped at a weighing station, and additionally, having no rear license plate, a fact easily observable by the officer, he had reason to check on this. The existence of these factors legitimated the action of the police and his "agent" in opening the door and looking at the serial number. Legally gathered information is admissible evidence. We respectfully submit that the information gathered by Mr. Ross and Officer Imboden was admissible.

E. GOVERNMENT EXHIBITS 12-E,
RECEIPTS FOR GASOLINE CHARGED
TO ROBERT L. CHESNEY, AND 9-A,
A RECEIPT FOR TRUCK PARTS SOLD
TO "CHESNEY TRUCK", WERE COR-
RECTLY RECEIVED INTO EVIDENCE.

A ruling of relevance is within the sound discretion of the judge, and ordinarily will not be disturbed upon appeal except for grave abuse. Hardy v. United States, 335 F.2d 288 (D.C. Cir. 1964). We respectfully urge that the trial judge carefully considered the objections by counsel for appellants, and then, considering the probative value of the exhibits, allowed them to be entered into evidence [R. T. 336-343; 421-422]. The trial judge, insisted on a

practical and common sense approach to the inferences that might be drawn from the evidence. We believe that his approach and decision was correct, or at least, so nearly correct as not to be the clear abuse of discretion that would require this Court to reverse him.

An individual piece of evidence does not establish guilt. Each piece must be considered in its relation to all other pieces. The relevance of one piece to the creation of an accurate account of the entire act under scrutiny can only be measured in light of the surrounding facts.

" . . . most convictions result from the cumulation of bits of proof which, taken singly, would not be enough in the mind of a fair minded person. All that is necessary and all that is possible, is that each bit may have enough rational connection with the issue to be considered a factor contributing to an answer. "

United States v. Pugliese, 153 F.2d 497, 500
(2nd Cir. 1945).

"Whether a particular circumstance is so clearly interwoven with the primary deed as to constitute a piece in the pattern of the episode in its entirety, hence necessary to set off the charge on trial in proper perspective, must be determined in the light of the particular facts of each case. "

(4th Cir. 1948).

These two pieces of evidence fit into an entire picture of the rather close relationship between Robert Loring Chesney and the Glavins. The record shows that Chesney had frequent and often clandestine contact with the Glavins towards their pursuit of the crime. Concerning the long wheelbase truck, Mr. Hellinger testified that he saw Roger and Leon Glavin standing near the truck while Robert Loring Chesney was down at the frame [R. T. 149]. Roger Glavin indicated that they were changing the serial numbers on the truck [R. T. 90-91]. When the truck was finally identified, it was found that the serial numbers were in fact changed [R. T. 366]. Further, in April 1966, Leon Glavin and Chesney approached Mr. William West with the purpose of renting a machine shop from him [R. T. 386]. They indicated that they intended to store or work on a truck that apparently belonged to both of them. Chesney inquired as to the source of power [R. T. 387]. Later Leon Glavin returned and indicated that he and Chesney were partners and had two trucks [R. T. 390]. Further, that Leon's brother Roger, was with one of the trucks on business back east [R. T. 392]. At the same time Leon asked West if he, Mr. West, could shorten the wheelbase on the tractor [R. T. 392]. Apparently Chesney was in "business" with at least Leon Glavin, knew of and participated in the truck altering activities; there is good reason to believe from this that Chesney knew all that was going on, and it is not a great jump to infer that he was a participant.

There is further evidence to tie in Chesney. Concerning the short wheelbase truck: Basil Buehler testified that on April 10, 1966, he saw Roger Glavin and Chesney working on and preparing a large black and white truck for painting [R. T. 455]. This was the identical color pattern of the stolen truck. Chesney then tried to hire Buehler to paint the truck, but Buehler refused [R. T. 457].

On May 3, 1966, Larry Rexius and Roger Glavin arrived back in California. Glavin drove to Chesney's machine shop in Glendale, got out of the truck and talked with Chesney [R. T. 253-255]. He then left, and was shortly thereafter arrested on the Ventura Freeway [R. T. 113]. It was at approximately the same time on May 3, 1966, that Chesney called Buehler on the telephone. He asked Buehler of his arrest the night before and then told Buehler essentially the following: that Roger Glavin was at Chesney's, meaning the shop; that he, Chesney, wanted Buehler to do him the favor mentioned before, that is, to get the incriminating evidence from Glavin's house, and to bring it to him, Chesney; that this was important to him [R. T. 461]. To clinch the matter, on the night that Chesney was arrested, Chesney said to Buehler as Buehler handed this material to Chesney that he, Chesney, "was glad to get it, because if it got into the wrong hands it would put them all behind bars" [R. T. 465, lines 2-6].

The direction towards which this evidence points is unmistakable to a reasonable man: that Chesney and the Glavins were in "cahoots" straight down the line. The Exhibits 9-A and 12-E merely serve to strengthen the already strong inference any jury

of reasonable men would naturally draw. The gas receipts were from a credit card bearing the name Robert L. Chesney. They showed the interstate transportation. Appellant Chesney's full name is Robert Loring Chesney. The practical man sees this as more than just coincidence. The inference is plain and highly relevant that Chesney either gave or lent his credit card to Roger Glavin to use on the business trip. In a perspective of the entire picture, it is relevant evidence to further elucidate the illegal nature of the relationship between Chesney and the Glavins. The same is true for the bill made out to Chesney truck. Counsel for appellant admits that this document was established by some foundation as being from Chesney's firm [R. T. 339], yet he says that the evidence should not have been admitted because there has been no proof that Chesney himself is the purchaser. We contend that even if Roger or Leon Glavin bought the goods, that plain common sense indicates that there is no reason nor way for men in business together to deceive each other in this way. The evidence shows the three men working together. The natural inference is that the parts were bought in conjunction with the activities of these same men. The evidence is highly relevant in this regard. We fully admit that these two pieces of evidence do not constitute the entire weight of evidence against appellants. If they did, doubtless we would have lost. We strongly suggest, however, that the evidence is very relevant in the creation of a picture of the entire operation. It is this completed picture that we were presenting to the jury and upon which they deliberated and decided.

In addition, considering Exhibit 12-E separately, the gasoline slips were also entered toward proof of the interstate nature of Roger Glavin's trip. They were admissible as such and should not be disallowed on appeal on an alternative plea that they may have prejudiced the case against Chesney.

If the court should find the admittance as evidence to be error, we urge that the case itself stands with or without either or both pieces of evidence. The weight of the evidence tying in Chesney has been discussed before.

" . . . and the question whether prejudice results from the erroneous admission of evidence is one of practical effect when the trial as a whole and all the circumstances in the case are regarded."

United States v. Tandaric, 152 F.2d 3, 6
(7th Cir. 1945).

"Where they have been received in evidence, the fact that they may have only remote relevance to the issue being tried is not ground for reversal, unless they are such as are clearly apt to have confused the jury's mind or to have improperly swayed its judgment."

Phelps v. United States, 160 F.2d 858 at 873
(8th Cir. 1947).

Neither piece of evidence can be said to have swayed the jury's judgment or confused its thought. The practical effect was at most to add to, not conclude, a fuller picture of the entire

scheme. Standing apart from the rest of the evidence, either separately or together, this evidence was but a minor item. We respectfully submit that without this evidence, the result would be the same, and today should remain so.

CONCLUSION

For the reasons set forth herein, the Government respectfully urges that the judgments and convictions of the appellants should be affirmed.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.,
United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

ROGER A. BROWNING,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Roger A. Browning
ROGER A. BROWNING

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Attorneys for Appellant

FILED

FEB 10 1967

WM. B. LUCK, CLERK

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN JOSEPH WALSH,

Appellant,

No. 19,950

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING
EN BANC

Comes now the appellant, by his attorney, and respectfully petitions pursuant to Rule 23, Local Rules, United States Court of Appeals for the Ninth Circuit, for a rehearing en banc of the issues raised by this appeal.

The grounds of this petition are as follows:

(a) A silent record is not sufficient to justify a holding that appellant waived his constitutional right to consult with counsel and/or remain silent. This Court should reverse its holding in Payne v. United States, 340 F.2d 748 (9th Cir. 1965).

(b) Incriminating statements made after preliminary hearing, indictment and arraignment were admitted into evidence even though appellant was without counsel. This was in clear violation of Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964).

(c) The comment by the prosecutor on appellant's failure to take the stand was recognized as error and the instructions by

1967

1 the Court, rather than curing the error, magnified it. Stewart v.
2 United States, 366 U.S. 1, 6 L.Ed.2d 84 (1961).

3 (d) The conduct of the Court after the jury indicated its
4 inability to reach a decision was coercive and requires reversal.

5 In support of this petition, appellant relies on the Opinion
6 of this Court dated January 11, 1967, the papers and records on
7 file herein and the legal authorities and arguments as set forth
8 in appellant's Brief.

9
10 COOLEY, CROWLEY, GAITHER,
11 GODWARD, CASTRO & HUDDLESON

12 By Paul A. Renne
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PAUL A. RENNE

PAUL A. RENNE, declares as follows:

That he is an attorney licensed to practice his profession in the State of California and is associated with Cooley, Crowley, Gaither, Godward, Castro & Huddleson, attorneys for appellant, and appointed by this Court and makes this certificate on behalf of petitioner herein.

Declarant has prepared said petition and certifies that it is made in good faith with no intent to delay.

The foregoing is declared under penalty of perjury.

DATED: February 10, 1967.



PAUL A. RENNE

No. 21374

IN THE

JUL 12 1968

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROGER LEE GLAVIN, ROBERT LORING CHESNEY,
Appellants,
vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal From the United States District Court
Central District of California.

PETITION FOR REHEARING.

G. G. BAUMEN,
1950 Sunset Boulevard,
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FILED

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WM. B. LUCK, CLERK

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No. 21374

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROGER LEE GLAVIN, ROBERT LORING CHESNEY,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court
Central District of California.

PETITION FOR REHEARING.

To the Honorable Judge Koelsch and Judge Browning,
Circuit Judges and the Honorable Judge Powell,
District Judge, sitting in the above matter for the
United States Court of Appeals for the Ninth
Circuit:

Appellants respectfully petition for a rehearing in
the above case and state:

**1. The Apparent Effect of the Decision Herein
Is Disregard the Rules of the Supreme Court
in the Glasser Case.**

A. In the opinion written in this case the Court mentions the case of *Glasser v. United States*, 315 U.S. 60 (1942) which was strongly relied upon by appellants. The court in its decision herein also comments on the remarks which were made by counsel—prior to the commencement of the trial—to the trial court to the effect that “*it appears there may perhaps be a conflict of interest here . . . and he (Mr. Glavin) has indicated that he does not wish me to represent him*” . . . as merely indicating that one of counsel’s two clients was dissatisfied and wished to replace him, and this somehow eliminated the situation from the *Glasser* case rule.

Rather than exempt it from the *Glasser* case rule, it brings it squarely within the rule of that case.

In the *Glasser* case, 315 U.S. at page 75, the court stated that there was yet another consideration in the matter, that Glasser wished the benefit of the undivided assistance of counsel of his own choice . . . and *that the desire on the part of an accused should be respected; that irrespective of any conflict of interest the additional burden of representing another party may conceivably impair the counsel’s effectiveness.*

Also, on page 76 of 315 U.S. in the *Glasser* case, the court pointed out that the right to have the assist-

ance of counsel was too fundamental to allow the courts *to indulge in nice calculations as to the amount of prejudice arising from its denial*. With all due respect to the scholarly presentation of this decision herein, it does appear that this court has indulged in nice calculations as to the amount of prejudice resulting from forcing two defendants to go to trial defended by one attorney when one of the defendants has stated—at the first opportunity available to him—that he did not want to be represented by the counsel and the counsel has stated to the court that the two cannot agree on how the representation of the defendants is to be handled.

The language of the defendant—which was held to be sufficient to warrant the court in appointing separate counsel—in the *Glasser* case was not as positive or as firm and certain as that here before the court. Here, as the court even mentions in its decision, Mr. Glavin had indicated that *he did not wish the counsel to represent him . . .* and this was prior to the commencement of the trial.

B. In the *Glasser* case the court pointed out on page 76 of 315 U.S. that the lower court was advised “*of the possibility that conflicting interests might arise . . .*” and that nevertheless the Court disregarded this . . . which was concluded to be error. In the case here before the court, as pointed out in the decision, it was stated to the trial court before trial, “*it appears there may perhaps be a conflict of interest here,*”. It is urged that this is as strong as the situation in the *Glasser* case . . . and was as far as an attorney, caught in such a situation, could ethically go in advising the court in such a matter.

C. The Court commented that counsel had represented Mr. Glavin for 19 days and suggests that an

earlier approach to the court should have been made. Counsel was the attorney for Mr. Chesney. At the arraignment before the commissioner he included Mr. Glavin at Mr. Chesney's request and appeared the one time in court on June 6th to enter a plea. As was pointed out to this Court on oral argument (in the presence of the U.S. Attorney who handled the matter), it was not until Friday night, before the trial on Monday (which trial was before an assigned trial judge from the State of Washington) that counsel was afforded the opportunity to inspect all of the exhibits proposed to be used and thus it was only on the week-end before trial that counsel was able to confront Mr. Glavin with all of the facts and demand answers and suggest a certain disposition of the case for him and a different one for Mr. Chesney . . . which procedure and proposals Mr. Glavin would not accept and told counsel he did not want him to be his attorney. This was immediately brought to the attention of the trial court at the next court day, the day of trial, the court denied it and in effect Mr. Chesney was denied representation, for the result of the refusal to relieve counsel from representation of Glavin was to keep Mr. Chesney off the stand, even though he had requested to counsel to testify to explain the situation he had gotten caught up in, but having to divide loyalty between two conflicting defendants, counsel could not permit such testimony and at the same time try to represent Mr. Glavin . . . thus, the only thing that was done was to compromise both of the defendants . . . and both were effectively denied the unfettered assistance of counsel.

2. The Effect of the Court's Decision Seems to Place the Burden of Full Disclosure of the Actual Facts of Conflict—Betray the Confidences of the Accused—as a Condition to Establishing Conflict of Interest.

The Court in its decision stated that Counsel did not identify any possible divergence of interest to the trial court . . . inferring that such disclosure was essential to obtaining relief. It was pointed out to the Court in Appellants' briefs that decisions in the State of California, citing Canon 37 of Canons of Professional Ethics of the American Bar Association, had held that it would be improper for an attorney to disclose the facts of such a conflict as this would violate his duty to preserve his client's confidence. Moreover, nowhere in the *Glasser* decision is there intimated that disclosure of the evidentiary and factual conflicts between two accused represented by one counsel is a requirement for obtaining single representation once the counsel has suggested to the court that there appears to be a conflict.

3. Admission of No Foundation Hearsay Documents Was Error.

The Court comments that Chesney was connected up sufficiently to take the risk in admitting gas tickets and receipt for truck parts over objection. Whatever the court considers as connection there was none aimed at nor tendered as to the hearsay documents which were admitted. The effect of the ruling seems to be that the documents not established to be from Mr. Chesney the accused, by use of a name the same as his name dispensed with the necessity for such connection. This added to the inability of that defendant to have full representation with his interests alone to protect (above those of Mr. Glavin) defeated the basic rights of Mr. Chesney to a fair trial.

4. The "Entrapment" Procedure Was Purely Utilized in a Non-Commission of Crime Situation to Plant Evidence for Trial Use.

The police had the evidence which they utilized Buehler to make a token presentation to Chesney. Mr. Chesney was not at the time committing any crime. If they believed him to be guilty of a felony they had more than adequate time to secure a warrant for his arrest. . . . They knew his location. What then was the purpose of the procedure followed to take evidence from their possession and put it temporarily in his hands except to create an impression to the trier of fact, of guilt of a crime, for which he was not then arrested nor was he then claimed to have been committing? Having to stand mute before the court because his attorney has a divided interest and cannot fully represent him, again in this situation cut off all avenues of fairness of the trial to Mr. Chesney . . . including the refutation of the testimony of Mr. Buehler (who Chesney was after because of a bad check given him by Buehler for \$275.00 on November 12, 1965).

For these reasons, it is respectfully urged that this matter be reconsidered and that a full rehearing be granted.

Respectfully submitted,

G. G BAUMEN,

Attorney for Appellants-Petitioners.

Certificate.

I certify that the foregoing Petition for Rehearing is in my judgment well founded in both fact and law, it is not interposed for purposes of delay and that in opinion of the undersigned the same is meritorious.

G. G. BAUMEN

NO. 21451 ✓

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DENNIS ROBERT H. MYERS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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FILED

MAY 3 1967

WM. B. LUCK, CLERK

MAY 8 1967

NO. 21451

IN THE UNITED STATES COURT OF APPEALS
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NO. 21451

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DENNIS ROBERT H. MYERS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant to be guilty as charged in both counts of a two-count indictment, following trial by jury (C.T. 5).^{1/}

The offenses occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 1407 and 3231, and Title 21, United States Code, Section 176(a). Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATEMENT OF THE CASE

Appellant was charged in both counts of a two-count indictment returned by the Federal Grand Jury for the Southern District of California, Southern Division . The first count alleged that appellant knowingly imported and brought approximately 26 pounds of marihuana into the United States from Mexico contrary to Title 21 , United States Code , Section 173 (C.T.2) .

The second count alleged that appellant knowingly concealed and facilitated the transportation and concealment of, approximately 26 pounds of marihuana , which, as he then and there well knew had been imported and brought into the United States contrary to law (C.T.3) .

Jury trial of appellant commenced on September 14 , 1966 before United States District Judge Luther W. Youngdahl . Appellant was found guilty as charged on both counts on September 15 , 1966 (C.T.5) .

Thereafter, on September 30 , 1965 , appellant was committed to the custody of the Attorney General for five years upon Count One and five years upon Count Two to run concurrently with Count One (C.T.10) .

Appellant subsequently filed a notice of appeal (C.T. 11) .

III

ERROR SPECIFIED

Appellant has specified only one point upon appeal:

"That the verdicts are not supported by substantial evidence."

STATEMENT OF THE FACTS

Appellant entered the United States from Mexico at about 11:00 P.M. on July 2, 1966. He was driving a car he had rented (R.T.9,17,33,43,51,65).

Appellant was from Canada (R.T.9,51). His passengers were two negro servicemen from the Missile Base at Malibu Beach, California (R.T. 10,16,28).

One of the servicemen, Wesley Kennedy, was seated with appellant in the front seat and Rudolph Waters was seated on the left-hand side of the rear seat (R.T. 33,40,49).

Immigration Inspector referred the vehicle and its occupants to the secondary inspection area for further search (R.T. 10,15).

At secondary, Herbert W. Ray, Customs Inspector, noted that the rear seat, "bottom cushion was protruding up on the right-hand side." He lifted the cushion and noticed packages of marihuana (R.T.15). Ray removed 19 kilo size bricks of marihuana weighing 26 pounds (R.T. 17,18).

The bricks were under the rear seat cushion and appeared to Inspector Ray to have fallen from behind the back rest. Ray also testified that the back rest. Ray also testified that the back seat must be removed before the marihuana could be placed behind the back rest (R.T.67,68).

The two servicemen were released by Customs Agent Donalson after consulting with the United States Attorney (R.T.21,6,27).

Wesley Kennedy, one of the passengers, testified he first met appellant on July 2, 1967 the date of their arrest, at 8:55 A.M. through

Private Waters (R.T.29). Waters testified he met appellant the day previous to their arrest while trying to get a ride back to the base. The buses had stopped running (R.T.41-43).

Waters had \$30 of his net service pay of \$109.00 (R.T.31), while Kennedy had only \$10 of his net pay of \$30 (R.T. 50).

The marihuana cost no less than \$475 and as much as \$1,200 according to Agent Donalson (R.T.70-71).

They arrived in Tijuana the afternoon of their arrest and after riding around, appellant parked the car on a parking lot, locked the car and left the key with the attendant (R.T.31). The servicemen went one way and appellant went the other (R.T. 36,38,48,62).

They returned to the car once and appellant wasn't there. They returned again and appellant was sitting in the car (R.T.36). The car had been moved (R.T.62).

Neither Waters nor Kennedy had been to Tijuana before (R.T.34) and neither had ever seen marihuana and never bought any marihuana in Mexico (R.T.32,45,50,51,58).

V

ARGUMENT

A. APPELLANT WAIVED HIS RIGHTS TO RAISE THE QUESTION OF SUFFICIENCY OF THE EVIDENCE ON APPEAL.

Appellant's argument amounts to a contention that the evidence was insufficient to support the judgment of conviction.

Appellant made no motion for judgment of acquittal at the close of the

trial.

Appellant has waived his right to question sufficiency of the evidence on appeal.

Lupo v. United States , 322 F.2d 569 (9th Cir. 1963)

Hardwick v. United States , 296 F.2d 24 (9th Cir. 1961)

B. THE PLAIN ERROR RULE SHOULD NOT APPLY.

The conviction should not be reversed as to the issue of sufficiency of the evidence unless there is plain error.

The facts in this case do not justify the finding of plain error. Though such a finding is clearly within the power of the Appellate Court it is "a power rarely exercised."

Lucas v. United States , 325 F.2d 867 (9th Cir. 1963)

Bilboa v. United States , 287 F.125 (9th Cir. 1923)

Similar restricted approaches to the plain error rule have been taken in other Circuits.

Johnson v. United States , 291 F.2d 150 (8th Cir. 1961)

DeLuna v. United States , 308 F.2d 140 (5th Cir. 1962)

And especially where appellant was represented at the trial by competent and experienced counsel, as in this case, it is submitted plain error should not be recognized readily.

C. THE EVIDENCE IS SUFFICIENT TO SUPPORT THE JUDGMENT OF CONVICTION.

Assuming arguendo, that appellant was entitled to review of the issue

of sufficiency of the evidence, the evidence is sufficient to support the conviction.

It is well settled that on appeal, the facts are to be interpreted most favorable to the government.

Glasser v. United States, 315 U.S.60 (1942)

Stein v. United States, 337 F.2d 14 (9th Cir. 1964)

Considering the facts most favorable to the government, there can be no dispute that appellant was in actual possession of the marihuana. The only question is knowledge.

The verdict is supported by substantial evidence. It was appellant had the car under his control and custody. Appellant rented the car. Appellant drove the car into the United States from Mexico with marihuana concealed in it. Appellant locked the car on the parking lot in Mexico. Appellant was alone in Mexico. Waters and Kennedy, his passengers, were together. Appellant was seated in the car when Waters and Kennedy returned to the car the second time.

Rental cars are commonly used by commercial smugglers.

Appellant apparently had no particular purpose in California. He could afford to rent a car. By way of contrast the finances of the servicemen passengers certainly didn't permit them to buy marihuana in Mexico costing from \$475 to \$1200. They had never been to Mexico before.

Waters had \$10 left out of his pay of \$30 and Kennedy had \$30 out of his pay of \$100.

Appellant relies heavily upon the teachings of Arellanes v. United States, 302 F.2d 603 (9th Cir. 1962).

That case is clearly distinguishable from the instant case on its facts.

In that case, the Court said at page 603:

"Mrs. Arellanes presence is as fully explained by her attachment to her husband as it might be by a control over the drugs."

But, as in the case at hand, Mrs. Arellanes position "with respect to control over the drugs is to be contrasted with what the evidence shows to be the position of her husband. . . . Thus, Mr. Arellanes is shown to have been in exclusive control and dominion of the vehicle throughout the relevant period. This factor, as we have had occasion to say before, 'is a potent circumstance tending to prove knowledge of the presence of (the) narcotics, and control thereof.'"

It can thus be seen that Mr. Arellanes was in the same situation as appellant finds himself. He was in sole direction and control of a car he had rented, parked and locked. He was driving the vehicle at the time the smuggling occurred.

Appellant seems to place emphasis on the fact he loaned his car to Mr. Kennedy a few hours the night before. Mr. Arellanes had loaned his car for an extended period (supra at 607). Mr. Arellanes conviction was not reversed by this Court.

Appellant contends the law requires the evidence to be inconsistent with every reasonable hypothesis of appellant's innocence.

Appellant requested no such instruction. The often cited Supreme

Court case of Holland v. United States, 348 U.S.21 (1954) says, on this point, at page 139,

"but the better rule is that where the jury is properly instructed on the standard of reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect."

The jury was properly instructed as to reasonable doubt (R.T.85,86, 88,89).

D. THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO FIND
POSSESSION IN APPELLANT.

Possession is sufficient to convict unless explained to the satisfaction of the jury. See Title 21, United States Code, Section 174.

Possession may be actual or constructive, sole or joint, and may be proved by circumstantial evidence.

Hernandez v. United States, 300 F.2d 114 (9th Cir. 1962).

This certainly doesn't mean appellant must testify or put on a case, but evidence must be produced in some manner to explain once possession is shown to be in appellant, as is contended here. No such evidence was produced.

CONCLUSION

The foregoing reasons, it is respectfully submitted that the jury verdict of guilty in the Court below should be affirmed.

Respectfully submitted,

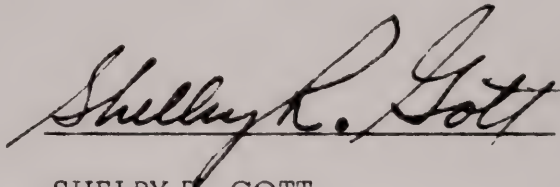
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United States Attorney

SHELBY R. GOTT,
Assistant U. S. Attorney

Attorneys for Appellee.
United States of America.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

A handwritten signature in cursive script, reading "Shelby R. Gott", written over a horizontal line.

SHELBY R. GOTT,
Assistant United States Attorney

NO. 21373 ✓

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Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

FILED

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AUG 12 1967

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STATEMENT OF JURISDICTION

Pages 2 through 5 of the Transcript of Record indicate that on or about June 16, 1965 an Indictment was filed in the United States District Court for the Southern District of California, Central Division, charging the defendant and appellant with a violation of Title 26, United States Code, Section 7206(1), and with a violation in two counts of Title 18, United States Code, Section 287.

Said Transcript of Record indicates on page 52 that a Judgment was filed on February 28, 1966, finding the defendant guilty as charged.

Said Transcript of Record, on page 53, indicates that on February 28, 1966, following the denial of a motion for new trial,

for Judgment of Acquittal and for arrest of Judgment, the defendant was sentenced on Count 1 to one year; and on Count 2 to the payment of a fine in the amount of \$500.00; and on Count 3 to a term of one year, to run concurrent with the time imposed on Count 1.

Said Transcript of Record indicates on page 54 that on February 28, 1966, a Notice of Appeal was filed by the defendant by and through his attorney, DEAN R. PIC'L.

The following references to the Transcript of Record clearly indicate that there is a final jurisdiction of a Court of the United States, in a criminal matter, from which an appeal may be prosecuted to this Court pursuant to Title 28, United States Code, Sections 1291 and 1294.

STATEMENT OF THE CASE

This is an appeal taken from a Judgment of Conviction heretofore rendered in the United States District Court for the Southern District of California, Central Division. The defendant has heretofore been convicted in three counts for violation of Title 26, United States Code, Section 7206(1), and for violations of Title 18, United States Code, Section 287, in two counts. Count 1, in essence, charges the defendant with having knowingly filed a false income tax return for the year 1959. Counts 2 and 3, in essence, charge the defendant with having knowingly filed false claims for refunds of income tax previously paid in the years 1957 and 1958, said claims for refund being based upon the net operating loss shown by the tax

return filed for the year 1959.

Succinctly stated, the evidence presented by the government, which the court found to be true, was to the effect that in computing the tax liability for the year 1959, the defendant, in substance, failed to include income in the amount of approximately \$35,000.00, and took as a deduction the sum of approximately \$42,000.00, to which he was not entitled. These two figures, totalling \$77,000.00, produced, as the government contended, an error in that amount in the defendant's tax return. This alleged error created a net operating loss for the defendant for the year 1959, and, as a consequence, formed the basis for the requests for refund for the years 1957 and 1958. It was the position of the government that the net operating loss was in error, and, as a consequence, the claims for refund for the two preceding years were likewise in error, and that all of this conduct was participated in by the defendant with knowledge of the facts and without a belief in the truth of the tax return filed for the year 1959 and the claims for refund filed for the years 1959 and 1958, and, as a consequence, establish the guilt of the defendant in all three counts.

More fully stated, it was the position of the government that in March of 1959 the defendant, as President of Volume Industries, Inc., a California Corporation, acquired for the sum of \$15,000.00 a television film series known as "The Little Rascals". The evidence presented indicated that the defendant sold that television series for the approximate sum of \$50,000.00, resulting in a gross profit of approximately \$35,000.00. The government contends, as

set forth on page 12 of the Transcript of Record, being a portion of the government's trial memorandum, that following a discount of certain notes received as evidence of said \$35,000.00, a net profit was realized by the defendant in the amount of \$29,999.92. The evidence presented by the government was to the effect that no portion of this \$29,999.92 appeared on the defendant's tax return as income.

Relative to the deduction in the amount of \$42,000.00, it was the contention of the government, as set forth in pages 13 and 14 of the Transcript of Record in a portion of the government's trial memorandum, that the sum of \$50,050.00 had been deposited in a bank by one GEORGE S. WILSON, a resident of Bakersfield, California. The evidence was uncontradicted to the effect that the defendant made efforts to recover said \$50,050.00 from Cuba following the Castro take-over in that country, and the freezing of all deposits of non-Nationals in the Banco Continental Cubano. It was conceded that the sum of approximately \$8,050.00 was expended by the defendant in an effort to recover said sum, and that the balance in the amount of \$42,000.00 was, in fact, lost and not accessible to either the original depositor, GEORGE S. WILSON, or the defendant. It was the position of the government that a loss of \$42,000.00 had in fact occurred, but that the loss was deductible to said GEORGE S. WILSON and not to the defendant, LEO EDWIN BROMBERG.

Succinctly stated, it was the position of the defendant, as substantiated by the testimony, that the transaction concerning the

"Little Rascals" was set forth in his books and records, but was, by error, not included in the tax return by his accountant, and because of varying personal problems occurring at the time, the defendant signed the 1959 tax return with the belief that it was a complete and accurate representation of his financial transactions and would, perforce, have included the transaction relative to the "Little Rascals". With reference to the \$42,000.00 deduction, occasioned by the loss in Cuba, it was the position of the defendant that said GEORGE S. WILSON, a client of the defendant who was, at the time of the occurrences herein, an Attorney at Law, licensed to practice in the State of California, had been induced to deposit said money upon the advice and counsel of the defendant, and that the eventual loss of the total sum of \$42,000.00 was occasioned by the failure of the defendant, as the attorney for said GEORGE S. WILSON, to discount said sum when an opportunity to do so had presented itself. As a consequence of these facts, the defendant felt personally obligated to said GEORGE S. WILSON for said sum and promised to repay said sum to his client. There was further evidence introduced at the time of trial that a statement was rendered to the defendant by said GEORGE S. WILSON which tended to corroborate and substantiate what the defendant contended was an agreement between himself and said GEORGE S. WILSON as to the defendant's liability for said sum.

Upon the basis of the evidence presented at the time of trial, it was the final and ultimate position of the defendant that the tax return filed for the year 1959 was, in the opinion of the defendant

at the time he filed said tax return, true and accurate to his own knowledge and belief. It was further the position of the defendant, in light of this opinion and belief relative to the tax return filed in 1959, that the claims for refund for the years 1957 and 1958 were equally valid, flowing as they did as a normal and natural consequence of the net operating loss shown in the year 1959.

In addition to the items hereinabove set forth, there was a contention upon the part of the government that the defendant had an additional \$3,000.00 of unreported income received from one HENRY VENTURA. This position of the government is set forth on page 11 of the Transcript of Record. No discussion will be made relative to this item as the court found that that contention of the government was not supported by the evidence.

ISSUES PRESENTED

I. THE DECISION OF THE COURT WAS NOT SUPPORTED BY THE EVIDENCE.

II. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THAT THE DEFENDANT'S TAX RETURN FOR THE YEAR 1959 WAS IN ERROR.

III. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THAT THE CLAIMS FOR REFUND, FILED FOR THE YEARS 1957 AND 1958, WERE IN ERROR.

IV. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THAT THE ERROR, IF ANY, IN THE TAX RETURN FOR

THE YEAR 1959, AND THE CLAIMS FOR REFUND FOR THE YEARS 1957 AND 1958, WERE KNOWINGLY MADE BY THE DEFENDANT.

V. THE COURT ERRED IN EXCLUDING EVIDENCE AS TO THE DEFENDANT'S INCOME AND EXPENSES FOR YEARS BOTH PRIOR AND SUBSEQUENT TO 1959.

SPECIFICATION OF ERRORS

I. THE COURT ERRED IN FINDING THE EVIDENCE SUFFICIENT TO SUPPORT CONVICTION.

II. THE COURT ERRED IN FINDING THE EVIDENCE SUFFICIENT TO SUBSTANTIATE THE CONTENTION THAT DEFENDANT'S TAX RETURN FOR THE YEAR 1959 WAS IN ERROR.

III. THE COURT ERRED IN FINDING THAT THE EVIDENCE WAS SUFFICIENT TO DEMONSTRATE THAT THE CLAIMS FOR REFUND FILED IN THE YEARS 1957 AND 1958 WERE IN ERROR.

IV. THE COURT ERRED IN FINDING THE EVIDENCE WAS SUFFICIENT TO SATISFY THE SCIENTER REQUIREMENT AS TO EACH COUNT IN THE INDICTMENT.

V. THE COURT ERRED IN EXCLUDING EVIDENCE AS TO THE DEFENDANT'S INCOME AND EXPENSES AS TO YEARS PRIOR AND SUBSEQUENT TO 1959.

In regard to the above Specification of Errors, the attention

of the Court is respectfully directed to Volume 4 of the Reporter's Transcript, pages 606 through 609. Therein the defendant made an offer of proof which, if accepted by the court, would have substantiated the contention of the defendant that at the time of the filing of the tax return for the year 1959 and the claims for refund for the years 1957 and 1958, the actual losses which he had sustained during the preceding four years, clearly demonstrated his right to the refunds which were received for the years 1957 and 1958, and would further serve to negate any finding of knowledge on his part as to falsity of the 1959 return and the claims for refund for 1957 and 1958.

ARGUMENT

I

THE DECISION OF THE COURT WAS NOT SUPPORTED BY THE EVIDENCE.

This issue raises the ultimate question which is presented by this appeal. In essence, the determination of this issue requires a consideration of the entire record, both the exhibits and the oral testimony presented. It is advanced to the Court as the initial issue because it is the one of prime importance and upon which the case should ultimately turn. Counsel for the appellant, in advancing this issue, well recognizes that its final determination rests upon the position which the Court takes relative to the four subsequent issues to be discussed in this Opening Brief. In the presentation of

appellant's argument on this initial issue, counsel for the appellant hereby incorporates by reference, as though fully set forth herein, those arguments and authorities which shall be presented to the Court in the discussion of the subsequent issues. All of those subsequent issues, together, serve to substantiate the validity of appellant's position on this first and crucial issue.

II

THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THAT THE DEFENDANT'S TAX RETURN FOR THE YEAR 1959 WAS IN ERROR.

The crucial question, presented in consideration of this issue, is whether or not the defendant was entitled to the net operating loss for the year 1959, as shown on the tax return which he filed for that year. This, in turn, depends upon whether or not his income for the year had been understated in the amount of approximately \$35,000.00, and, secondly, whether or not he was entitled to a deduction in the amount of \$42,000.00.

With reference to the first of these questions, the attention of the Court is respectfully directed to the testimony of MR. ROBERT M. ABELS, the accountant and employee of the Internal Revenue Department, who was called by the government in the presentation of their case in chief. The testimony of MR. ABELS commences on page 380 of Volume 3 of the Reporter's Transcript. Said testimony concludes, on page 503 of that volume. Certain references will be made to specific portions of that testimony with

the contention of counsel for the appellant that those specific portions to which reference is made, adequately reflect the entire tenor of the witness' whole testimony which would be evidenced upon a reading of it in its entirety.

On page 383, commencing at line 18, MR. ABELS testified that the general condition of the books for the year 1959, was incomplete. The testimony of MR. ABELS, as contained on pages 412 through 415, clearly demonstrates an attempt on his part, in substantiating the government's case, to take the highest figure of income, be it shown on the books or the tax return, and the lowest figure of expenses, be they those shown on the books or the tax return, and chose to ignore the true computation of income and expenses as demonstrated by all of the evidence which was available to him. In making his original computations, MR. ABELS indicated, as set forth in Volume 3, page 466, lines 2 through 6 of the Reporter's Transcript, that no reference whatsoever was made in the books of MR. BROMBERG as to the funds received for the sale of "The Little Rascals" television program, and yet, in the testimony which followed the above lines, Account 201 clearly indicated the receipt of those funds. Since the receipt had been indicated upon the books, it is submitted to the Court that the great gravamen of this issue is demonstrated in the testimony of the defendant's own accountant, BERNARD LEBE. MR. LEBE testified, in Volume 4 of the Reporter's Transcript, lines 2 and 3 on page 531, that for the years 1956 through 1959 he was the accountant for the defendant and appellant. Page 533, lines 5 through 6, MR. LEBE testified that

he prepared the tax returns for the defendant in the years 1956 through 1958, and in lines 7 and 8 he indicated that he prepared that return for the year 1959. He further testified on page 534, lines 4 through 6, that the books were available to him at the time of the preparation of the return. He further testified, lines 20 through 24, that the books had been neglected and were not full and complete at the time of the preparation of the tax return. Commencing on page 542, at line 20, through line 2 on page 543, the witness LEBE clearly demonstrated that he had no explanation of why it was that the books showed business expenses in the amount of \$109,000.00, and he took only a deduction of \$95,000.00 on the tax return.

On page 543, lines 3 through 9, the witness testified that he didn't even look at one of the accounts which was set forth in the books.

The exact condition of the books is perhaps best demonstrated by MR. LEBE'S testimony on page 544, lines 12 through 13, of the Reporter's Transcript, when the question was put:

"Q. In the vernacular the books were in a mess?

"A. Correct."

On page 546 of the Reporter's Transcript, commencing at line 5 through line 10, the witness LEBE indicated that he had the assistance of his son, who had passed the CPA exam, in preparing the return, and that he wanted to do it in a hurried fashion to conclude the job.

From these specific items of testimony, as well as the entirety of the testimony of this witness, it is apparent from the books and records available to him, a rather hurried job was performed to prepare a tax return without any great degree of confidence as to whether or not that tax return, as ultimately prepared, really conformed with the books and records which were made available to him. This return then, after having been prepared, was submitted to the defendant for his signature. Putting together the entire testimony of both accountants, MR. ABELS, called on behalf of the PEOPLE, and MR. LEBE, called on behalf of the defendant, clearly indicates that the books adequately reflected the total income received by the defendant, including the \$35,000.00 gross profit on "The Little Rascals" transaction, but, because of sloppy accounting procedures, did not appear in the tax return which was filed.

This position is further substantiated by a consideration of the testimony of MELVIN SINGER, whose direct testimony commences on page 595 of Volume 4 of the Reporter's Transcript and continues over into Volume 5 of said Transcript. MR. SINGER testified as to what the defendant's tax liability and true financial affairs were for the year 1959, as a result of a reconstruction of all of the defendant's financial transactions for the years 1956, through the period in question, as well as subsequent years. The essence of the testimony of MR. SINGER, as set forth, essentially, in pages 720 through 724, is to the effect that, considering sum total of all of the years in question, there was no error on the defendant's 1959 return which resulted in any loss to the government, and further,

based upon a consideration of all of this evidence, the defendant was entitled to the refunds which he received for the years 1957 and 1958.

When the testimony of the defendant, when he took the stand, is added to the testimony heretofore discussed, it is submitted to the Court that there was ample evidence to substantiate the contention of appellant that the income shown on the defendant's return for the year 1959, was an accurate reflection of his total income for that year.

The validity of the \$42,000.00 deduction, relative to the Cuba transaction, necessitates initially the consideration of the testimony of GEORGE S. WILSON. MR. WILSON testified in Volume 2, page 204, lines 14 through 20, that the deposit in Cuba had been made at the request of MR. BROMBERG. On page 205, lines 18 through 21, MR. WILSON testified that he was willing to enter into this transaction if there would be no personal liability to him as a result of his participation. Page 216, lines 23 through 24, MR. WILSON testified that at one point in time MR. BROMBERG had received the \$50,000.00 out of the bank in Cuba in the form of both cash and cashiers' checks. Page 217, lines 19 through 23, MR. WILSON testified that he had the utmost confidence in MR. BROMBERG and believed that MR. BROMBERG was going to make every effort to obtain the money and that upon obtaining it, it would be remitted to MR. WILSON. Needless to say, on page 218, lines 17 through 19, and subsequent testimony, MR. WILSON indicated that he considered the money to be his, which, it is submitted to the Court, was natural testimony upon his part since he had already

taken a deduction on his own tax return for that loss.

Of equal significance is the testimony of MR. WILSON on page 233, with reference to Defendant's Exhibit D, which was a letter from MR. WILSON's accountants to MR. BROMBERG setting forth the belief of the accountants as to an indebtedness from MR. BROMBERG to MR. WILSON for a transaction with one BRADY, which were the parties involved in the Cuba transaction of almost the exact sum of money which had been lost in the Cuba transaction, and it is significant that MR. WILSON is unable to explain what could be the possible basis of that claimed indebtedness since there were no other transactions involving WILSON, BRADY and BROMBERG except the Schenley distributorship in Cuba.

On page 238 of the Reporter's Transcript, commencing at lines 15 through 21, is evidence that MR. BROMBERG discussed with MR. WILSON the fact that he carried malpractice insurance and that he had missed the opportunity to discount the cashiers' checks in Miami, Florida. This testimony, it is submitted, clearly indicates a state of mind wherein the defendant considered the loss to be one which had been occasioned by his conduct and one which would give rise to a cause of action in MR. WILSON against him for that loss, and entitle him to a deduction for it. Further substantiation relative to the Cuban loss is contained in the testimony of MARJORIE RUBIN on page 293 of Volume 2 of the Reporter's Transcript, in lines 3 through 6, wherein MRS. RUBIN testified that in a conversation with the defendant, it was the position of the defendant that MRS. RUBIN had lost the money for him, meaning

the defendant, LEO BROMBERG. It is further apparent from the cross-examination of MRS. RUBIN that the defendant paid certain sums of money on account of MRS. RUBIN as compensation for what she contended was her inconvenience in the Cuban transaction. This is set forth in the Reporter's Transcript, Volume 2, page 304, lines 10 through 22.

In the testimony of MRS. RUBIN on page 306 of Volume 2, at lines 9 through 11, it was clear that MR. WILSON felt no obligation on his part to that witness for the inconvenience. On page 311, upon being told of the inconvenience and her desire for compensation, MR. WILSON laughed, and, finally, on page 313 of the Reporter's Transcript, lines 18 through 24, the witness admitted that on December 18, 1962, in an affidavit, she had indicated that GEORGE WILSON had told her that he had made repeated demands upon LEO BROMBERG for the return of the money deposited in Cuba as a proposed investment, and that LEO BROMBERG had ignored said requests. As a consequence of all of this testimony, it is submitted that the circumstances were such that the loss was, in fact, that of the defendant LEO EDWIN BROMBERG, and he was entitled to the deduction which he took.

These two subissues, then, i. e., that the income reflected in the 1959 tax return was an accurate reflection of the defendant's income for that year, and, secondly, that he was entitled to the deduction for the sum of \$42,000.00, serve, it is submitted, to substantiate the first issue presented by this appeal that the evidence was insufficient to establish that the defendant's tax return for the

year 1959 was in error.

III

THE EVIDENCE WAS INSUFFICIENT TO
DEMONSTRATE THAT THE CLAIMS FOR
REFUND FOR THE YEARS 1957 AND 1958
WERE IN ERROR.

The substantiation of this issue is inherent in the very nature of a claim for refund. If a tax return, filed for a given year, is correct and accurate, and it shows a net operating loss, there is no question as to the validity of a claim for refund or the right of an individual to make such a claim. Counsel for the appellant hereby incorporates by reference as though fully set forth herein, the argument presented relative to the immediately preceding issue, in substantiation of the contention that the evidence was insufficient to demonstrate that the claims for refund for the years 1957 and 1958 were in error.

IV

THE EVIDENCE WAS INSUFFICIENT TO SHOW
THAT ANY ERROR IN THE DEFENDANT'S TAX
RETURN FOR THE YEAR 1959 OR IN THE
CLAIMS FOR REFUND FOR 1957 AND 1958 WERE
KNOWINGLY MADE.

The presentation of this issue requires, initially, a consideration of the mens rea requisite to a conviction of the counts charged against the defendant in this case. The attention of the Court is respectfully directed to the discourse between Court and

Trial Counsel set forth in Volume 5 of the Reporter's Transcript, commencing on page 702 and continuing through page 708. The attention of the Court is also respectfully directed to the Trial Memorandum filed by the defendant on March 28, 1966, which commences in the Transcript of Record on page 33. Said Trial Memorandum is incorporated herein by reference as though fully set forth herein.

The court, in essence, took the position that Count 1, charging the violation of Title 26, Section 7206(1), was not, in essence, a fraud section, and as a consequence did not have a scienter requirement, but that Counts 2 and 3 for violations of Section 287 of Title 18 of the United States Code, did sound in fraud and did have a scienter requirement.

It is submitted that if anything, the converse is true. How can it be contended that one who files a tax return without any knowledge that it is false, be guilty of fraud if he requests from the government a refund to which that tax return would normally entitle him? The very words of Section 7206(1) of Title 26, United States Code, using as they do the terms "wilfully" and the phrase "and which he does not believe to be true", clearly substantiate the necessity of adequate proof of scienter of the nature involved in any fraud prosecution. The testimony heretofore discussed as to the nature of the defendant's books, the fact that they did include reference to all of the transactions in which he had been involved, the testimony relative to the Cuban transaction, coupled with the testimony of the defendant himself as set forth in the Transcript as

to the personal problems with which he was beset at the time of the filing of the return, clearly serve to negate any scienter on his part as to the falsity of the 1959 return. The failure of the prosecution to bear the burden of proof on the scienter issue, relative to Count 1, is fatal not only to that Count, but to the two subsequent counts as well, by virtue of the fact that they depend entirely upon the falsity of the 1959 tax return. Further substantiation relative to this issue is presented by a consideration of the final issue to be discussed hereafter concerning the error of the court in refusing to permit the introduction of evidence which would have served to further negate any knowledge upon the part of the defendant as to the falsity of the 1959 tax return, as well as the claims for refund for the years 1957 and 1958. The argument to be presented relative to that issue is incorporated herein by reference as though fully set forth.

The sum total of all of the evidence contained in the Reporter's Transcript indicates that at the time of the filing of 1959 tax return and the claims for refund, the defendant sincerely believed that the loss which he had sustained for the year 1959 was at least as great as that demonstrated in that return and, as a consequence, he was entitled to refund from the government for the years 1957 and 1958 in an amount equal, at least, to the amount requested in those claims.

Therefore, it is respectfully submitted that the evidence was insufficient to show that any error in the 1959 tax return or the claims for refund for the years 1957 and 1958 were knowingly made by the defendant.

V

THE COURT ERRED IN EXCLUDING EVIDENCE
AS TO THE DEFENDANT'S INCOME AND EXPENSE
AS TO PRIOR AND SUBSEQUENT YEARS.

The attention of the Court is respectfully directed to the testimony in the Reporter's Transcript on pages 606 through 609, wherein certain testimony was offered by the defendant which was rejected by the court. The Trial Memorandum submitted by the defendant on January 28, 1966, to which reference has heretofore been made, page 33 of the Transcript of Record, also relates to the offer of this evidence. It is the position of the defendant and appellant that any evidence which would serve to negate the knowledge of the error in the 1959 return, and which would substantiate his good faith belief in his entitlement to the claims for refund filed in the years 1957 and 1958, should have been admitted by the court for the probative effect which it would have upon this crucial element in a fraud prosecution. All of such evidence was rejected.

As indicated in the portion of the Transcript to which reference has been made, this evidence would have indicated that a correct computation of the defendant's income and expenses up to the date upon which he signed the 1959 tax return, which were matters presumably within his knowledge at that time, were more than sufficient to indicate a net operating loss even greater than that shown in the 1959 return even if one overlooked the items questioned by the government, and further indicated that he was entitled, at least, to the refunds which he obtained for the years 1957 and 1958,

based upon that recomputation.

Numerous cases have substantiated the position relative to the requisite knowledge of the defendant for a prosecution under Title 26, United States Code, Section 7206(1) (Gunn v. C.I.R., 247 F.2d 359; Knowles v. United States, 224 F.2d 168; Cosgrove v. United States, 224 F.2d 146; see cases cited in Trial Memorandum commencing on page 33 of Transcript of Record).

The court, without benefit of this evidence, was not in a position to correctly evaluate the state of mind of the defendant at the time of the signing of the 1959 return and the filing of the claims for refund, and, therefore, did not have before it crucial evidence relative to one of the important issues involved in the prosecution.

It is therefore respectfully submitted that the court erred in rejecting evidence as to the defendant's income and expenses during prior and subsequent years.

CONCLUSION

Obviously, this case is an important one, not only to the government, charged as they are with the vigorous enforcement of the law, but to the defendant and appellant as well, who, as an attorney, endures not only the stigma of conviction and the penalty imposed, but suffers, as well, the suspension of his license to practice law. The full and complete extent of the total punishment which the defendant bears as a result of these convictions is alone sufficient to require the Court to give extreme consideration to the

issues presented for determination by this appeal. The consequence of an affirmance or a reversal are far from minimal. Upon the basis of all of the arguments heretofore presented, a consideration of the Trial Memoranda filed by all counsel, and the testimony presented by all of the witnesses, it is respectfully submitted that the convictions heretofore entered against the defendant should be reversed.

Respectfully submitted,

DEAN R. PIC'L

Attorney for Appellant

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Dean R. Pic'l

DEAN R. PIC'L

Attorney for Appellant

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

FILED

OCT 3 1967

WM. B. LUCK, CLERK

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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APPELLEE'S BRIEF

I

STATEMENT OF PLEADINGS AND
FACTS DISCLOSING JURISDICTION

On June 16, 1965, the Federal Grand Jury for the Southern District of California, returned indictment No. 35017-CD, in three counts, charging Appellant Leo Edwin Bromberg with violations of 26 U. S. C. §7206 (Count 1) and 18 U. S. C. §287 (Counts 2 and 3).

The indictment alleged in substance as follows:

Count 1 - On or about December 10, 1960, Appellant willfully and knowingly made and subscribed a joint income tax return under penalty of perjury which he did not believe to be true and correct, as Appellant on said tax return stated that the gross income for

himself and his wife for 1959 was \$69,485.03, and the net operating loss for 1959 was \$88,026.68, whereas he then and there knew and believed that the gross income of himself and his wife for 1959 was \$102,484.95 and the net operating loss for 1959 was \$13,026.76.

Count 2 - On December 10, 1960, Appellant presented to the Treasury Department through the District Director of Internal Revenue (District of Los Angeles), a claim for refund consisting of a claim Form 843, and an application for tentative carryback adjustments Form 1045, stating that as a result of a net operating loss of \$88,026.68 for the calendar year 1959 there was a decrease in income tax liability for the taxable years 1956, 1957 and 1958 by reason of a carryback loss. Appellant therein claimed a refund in the amount of \$4,895.15 for the taxable year 1957, which claim Appellant knew to be fraudulent in that the true and correct net operating loss for the taxable year 1959 was in the sum of \$13,026.76 and there was no net operating loss carryback for the taxable year 1957.

Count 3 - On December 10, 1960, the Appellant presented to the Treasury Department through the District Director of Internal Revenue (District of Los Angeles), a claim for refund consisting of a claim, Form 843, and an application for tentative carryback adjustments, Form 1045, stating that as a result of a net operating loss of \$88,026.68 for the taxable year 1959 there was a decrease in income tax liability for the taxable years 1956, 1957 and 1958 by reason of a carryback loss. Appellant therein claimed

a refund in the sum of \$661.68 for the taxable year 1958, which claim Appellant knew to be fraudulent in that the true and correct net operating loss for the taxable year 1959 was in the sum of \$13,026.76 and there was no net operating loss carryback for the taxable year 1958 [C. T. 2-5]. ^{1/}

On July 19, 1966, Appellant was arraigned [C. T. 6, 7]. Appellant entered pleas of not guilty to the charges in the indictment on October 25, 1965 [C. T. 6].

On January 10, 1965, Appellant waived trial by jury and the court trial of Appellant commenced on January 10, 1966, before the Honorable Peirson M. Hall [C. T. 20, 21]. At the close of the Government's case on January 10, 1966, Appellant made a motion for judgment of acquittal, which motion was denied [C. T. 30]. At the conclusion of the trial on February 4, 1966, Judge Hall found Appellant guilty as charged [C. T. 47].

On February 9, 1966, Appellant filed motions for a New Trial, Judgement of Acquittal and Arrest of Judgment [C. T. 48-51]. On February 28, 1966, after hearing, Judge Hall denied these motions and sentenced Appellant to imprisonment for a term of one year on Count 1, a fine of \$5,000 on Count 2, and to imprisonment for a term of one year on Count 3, sentences to run concurrently [C. T. 52 and 53].

A timely notice of appeal was filed by Appellant [C. T. 54-55].

The United States District Court for the Southern District of

^{1/} C. T. refers to Clerk's Transcript.

California had jurisdiction in this case pursuant to 26 U.S.C. §7206(1) and 18 U.S.C. §§ 287 and 3231.

II

STATUTES INVOLVED

26 U.S.C. §7206(1) provides:

Any person who--

(1) Declaration under penalties of perjury.

Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; (shall be guilty of a felony).

18 U.S.C. §287 provides:

False, fictitious or fraudulent claims

Whoever makes or presents to any person or officer in the . . . service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be guilty of a felony.

III

STATEMENT OF THE CASE

A. QUESTIONS PRESENTED

Appellant, on pages 6 and 7 of his Brief under the heading "ISSUES PRESENTED" and "SPECIFICATION OF ERRORS", lists five contentions under each heading; we have winnowed these to the following questions which appear to be the questions that Appellant seeks this Court to review:

1. Was the evidence sufficient to convict Appellant of each of the three counts?

(a) Does the evidence support the court finding that Appellant on his 1959 tax return willfully and knowingly made a false statement of a material matter by understating his gross income by the sum of \$32,999 and overstating his net loss in the sum of \$75,000?

(b) Does the evidence support the court's finding that Appellant (based upon a net operating loss of \$88,026.65 in his 1959 tax return) knowingly and fraudulently submitted a false application for carryback adjustment and claims for refund in the amount of \$4,895.15 for the year 1957 and \$661.65 for the year 1958?

2. Did the court commit prejudicial error in refusing to allow Appellant to attempt to prove that Appellant's income tax returns for the years 1956, 1957 and 1958, did not correctly reflect

his income in three years and that Appellant had losses in 1960, 1961, 1962, 1963 - when Appellant filed no returns for the subsequent years?

B. STATEMENT OF FACTS

On December 10, 1960, after obtaining two extensions - Appellant (an attorney with a Masters degree in taxation) together with his wife filed their 1959 Income tax return [R. T. 539, 558, 1006; Exhibit 1D]. ^{2/} The return which was signed by Appellant under penalty of perjury reported as follows:

Gross Income	\$ 69,485.03
Net loss from legal practice	(24,377.22)
Other Business Losses	
Loan to Barnhart Morrow Corp.	
- Defunct	(21,649.46)
Confiscation of bank account by	
Cuban (Castro) Government	
NET LOSS	\$(88,026.68)

Concurrently with filing his 1959 return, Appellant filed claim applications for tax refund Form 843 (Exhibits 2B, 2C, 2D) together with an Application for Tentative Carry Back Adjustment, Form 1045 (Exhibit 2A). The claims for a tax refund in the years 1956, 1957 and 1958, were based upon the net loss of \$88,026.68

^{2/} R. T. refers to Reporter's Transcript.

reported by Appellant in 1959. Appellant and his wife, pursuant to their claims for refund, in fact received tax refunds (Exhibit 2E) as follows:

1956 - \$3,476.98 plus \$213.76 interest

1957 - \$9,774.55 plus \$600.93 interest

1958 - \$1,323.36 plus \$ 81.36 interest

The indictment and the government's case were based on Appellant's understatement of gross income in the amount of \$32,999, and in the overstatement of the operating loss in the amount of \$42,000 [C. T. 2-5, 10-12]. The effect of these false statements was the overstatement of Appellant's net loss by \$75,000, thus reducing his net loss from \$88,026.68 to \$13,026.76.

1. The \$42,000 Cuban Loss Trans-
action.
-

Appellant, in 1958, represented a Mr. George Wilson, who was President of the Wilson Mortgage Company and a client of Appellant for some years. In late 1958, Appellant discussed with Mr. Wilson and one Louis Brady and Eugene Warner the organization of a corporation to distribute Schenley liquor products in Cuba. The corporation was to be known as the Carribean Liquor Distributors, Inc. [R. T. 203-206]. Appellant informed Mr. Wilson that the Schenley Company had asked that the Carribean Liquor Distributors, Inc. evidence some financial responsibility and requested Mr. Wilson to deposit \$50,000 in a bank in Cuba as evidence of financial

strength of that corporation. Appellant informed Wilson that it would only be necessary for the \$50,000 to be left on deposit for a short time, and in return Wilson was to receive a controlling interest in Caribbean Liquor Distributors, Inc. [R. T. 212]. Sometime in the middle of December 1958, Appellant, Wilson, Brady and Warner travelled to Cuba; and Mr. Wilson, in the presence of Appellant, deposited \$50,000 in the Banco Continental Cubano in Havana, Cuba, in an account entitled "Caribbean Liquor Distributors, Inc." [R. T. 212-213]. Wilson testified that it was his understanding from Appellant that the money was to remain on deposit for about two weeks, and that no part of the \$50,000 was contributed or belonged to Appellant [R. T. 213-215]. The authorized signatories on the account were Mr. Wilson and Appellant [R. T. 236].

In the last week of December 1958, the Batista regime fell and Castro seized power in Cuba [R. T. 207]. In January 1959, Mr. Wilson learned that the Schenley Liquor Company did not approve the Caribbean Liquor Distributors, Inc. becoming a distributor for its products [R. T. 231]. Mr. Wilson then attempted to retrieve his \$50,000 from the Banco Continental Cubano by a bank collection draft [R. T. 216]. The draft was not honored by the Cuban bank. Mr. Wilson then discussed the matter with Appellant, who stated that he (Appellant) could go to Cuba and get the \$50,000, and Wilson stated: "Fine go ahead." [R. T. 216]. Through later conversations with Appellant, Wilson learned that Appellant went to Cuba in an effort to retrieve the \$50,000 [R. T. 216, 217].

In Cuba Appellant obtained a portion, \$8,000 in pesos, and \$42,000 in cashier's checks (3 checks in amount of \$14,000 each). At this time it was a criminal offense punishable by death to take currency out of Cuba [R. T. 964]. Appellant was unable to negotiate the cashier's checks in Cuba and after spending the \$8,000 there returned to the United States with the 3 cashier's checks [R. T. 963, 965, 966]. Appellant then attempted to negotiate the cashier's checks through the Citizens National Bank; however, the Citizens National Bank was unable to negotiate the checks and returned them [R. T. 966-967]. Appellant then turned the three cashier's checks over to Edward Jaffee, and suggested that Jaffee go to Cuba and attempt to buy \$42,000 worth of airline tickets [R. T. 967, 969].

Mrs. Marjorie Rubin, testified that in June or July of 1959, she received three cashier's checks totaling \$42,000 drawn on the Banco Continental Cubano and payable to the order of Appellant from Edward Jaffee [R. T. 283, 284]. Mrs. Rubin had been informed by Mr. Jaffee that she should meet an airline pilot at the airport in Havana, Cuba and receive a book. She went to the airport and received a book entitled "The Ugly American" [R. T. 286]. Inside of the book were the three cashier's checks each in the amount of \$14,000. By telephone Mr. Jaffee then instructed Mrs. Rubin to negotiate the checks for travel tickets in the amount of \$42,000. One-half of the travel tickets to be made out in the name of Mr. and Mrs. Edward Jaffee and one-half made out in the name of Mr. Mrs. Leo Bromberg [R. T. 287]. Mrs. Rubin attempted to negotiate these cashier's checks at the Banco Continental Cubano;

however, before she could successfully consummate the negotiation of the checks she was arrested by the Cuban police [R. T. 289], held in detention and the checks were confiscated by the Cuban Agrarian Land Reform [R. T. 290]. Mrs. Rubin was subsequently released by the Cuban police and eventually returned to the United States. In October 1959, she saw Appellant at an apartment of a mutual friend; also present were Mr. Frank Stillman and Mr. George Tallis. Mrs. Rubin told Appellant that she felt he owed her something for her inconvenience in attempting to negotiate the cashier's checks into travel tickets [R. T. 291, 292]. Appellant told her that the money represented by the checks was not his and, therefore, he would not be responsible. He then told her to call Mr. George Wilson [R. T. 292].

Mr. Jacob Ben-Porat, a business associate of Appellant, testified that in July or August 1959, he was discussing the international situation with Appellant. A conversation ensued wherein Porat told Appellant that he hoped Appellant did not have any money tied up in Cuba, and Appellant stated: "No I don't; however, some of my clients and friends do." [R. T. 355, 357].

Eugene Warner, a Las Vegas, Nevada real estate broker, who was involved in the Caribbean Liquor Distributors, Inc. with Appellant and Louis Brady, stated that during several organizational meeting Appellant advised the group that he had applied for the Schenley distributorship in Cuba and introduced George Wilson. Warner stated that Wilson was the man who had financed the arrangement and that the \$50,000 deposited in the Cuban bank belonged to

George Wilson [R. T. 319, 325].

Appellant's legal secretary and bookkeeper from August 1956 through April 1960, Pauline Sherry, testified that in 1959, Appellant told her that the \$42,000 on deposit in Cuba belonged to Wilson, and that he (Appellant) was going to try and recover it [R. T. 180, 181, 190].

Special Agent Paul G. Mahon, Intelligence Division, Internal Revenue Service, testified that he interviewed Appellant on August 20, 1962, at Beverly Hills, California. Appellant stated that he was involved in the Cuban transaction which resulted in a \$50,000 loss, and that the money was the funds of Mr. George Wilson [R. T. 335]. Agent Mahon also stated that Appellant had informed him that the money had been deposited in a Cuban bank, and was subsequently impounded by the Castro government.

Robert M. Abels, Revenue Agent, Internal Revenue Service, testified that he made an examination of Appellant's books for the years 1956 through 1959, and that Appellant's records did not reflect any loss or confiscation of a bank account in Cuba in the amount of \$50,000, or any other amount [R. T. 388].

Bernard Lebe, a Certified Public Accountant, testified that he had maintained the books for Appellant for 1956, 1957, 1958 and 1959, and prepared Appellant's 1956, 1957, 1958 and 1959 income tax returns. In the years 1956, 1957 and a portion of 1958, Appellant and Mr. Lebe were associated together in an office [R. T. 532]. According to Mr. Lebe, Appellant had a good knowledge of tax law and accounting [R. T. 539]. Appellant in the early part of

1960, requested Lebe to get extensions of time in which to file the 1959 return. On April 11, 1960, Appellant filed a request for extension of time to file his return (Exhibit N). In the beginning of 1960, Appellant and Lebe discussed the \$42,000 loss that occurred and Appellant told Lebe he wanted to claim it. Mr. Lebe asked Appellant, "Are you sure that this is your loss? It appears to me that this is Mr. Wilson's loss." Appellant said, "No this is my loss". Lebe told Appellant, "This in the face may seem like your loss but until you part with net worth if you owe this money to Mr. Wilson you must part with net worth before you take a loss." Appellant then told Lebe, "You take my word for it this is my loss and don't go into any detail about the investment or the type of investment" [R. T. 539, 540]. Because Appellant insisted upon claiming the loss in his return, Lebe refused to sign the return [R. T. 540]. Appellant's books did not reflect the \$42,000 loss he claimed on his return [R. T. 538]. After Lebe had prepared the return, he again discussed the loss figures shown on the return with Appellant. Lebe refused to sign the return because it did not show correct information [R. T. 537]. In response to a question: "Did you find anything in the books showing the Cuban loss of Mr. Bromberg of \$42,000?" [R. T. 544-545]. Mr. Lebe stated:

I wanted to terminate my relationship with preparation of this return. During the summer months I told Mr. Bromberg that I didn't believe that the loss [\$42,000] was his. Finally I told him I could prepare the return but I'm not going to sign

it. I thought he would probably have somebody else prepare the return. He said, 'You prepare the return and I will sign it.' [R. T. 545].

The Barnhart-Morrow loss of \$21,000 claimed on the 1959 return likewise did not come from Appellant's books, but rather Mr. Lebe received that information from Appellant [R. T. 545].

Based upon the 1959 return Lebe prepared the applications for refund, Claim 843 and application for tentative carryback adjustments form 1045, and left these and the 1959 tax return with Appellant. Appellant executed these documents and filed them with the Treasury Department [R. T. 570, 571, 576, Exhibits 1D, 2A through 2D).

Mr. Wilson testified that Appellant told him that he (Appellant) felt responsible for getting Wilson involved in the \$50,000 loss [R. T. 238]. Appellant's counsel in cross-examination, asked Wilson: "After it became apparent that this money was not going to be returned, after you had these discussions with the defendant after he expressed to you his feeling of responsibility, did you ever say to him 'pay me when you can?' Answer: No." "Question: Nothing like that last portion of the conversation ever occurred? Answer: No." [R. T. 238, 239]. Wilson testified that he never asked Appellant to pay the \$50,000, and never looked to him (Appellant) for repayment [R. T. 251].

Robert J. McKenzie, a C. P. A., who handled Mr. Wilson's books and prepared his tax returns testified that Wilson's books

reflected the \$50,000 as a receivable from Caribbean Liquor Distributors, Inc. during 1959, and this sum was subsequently written off as uncollectible during 1959 [R. T. 260].

Appellant testified that after the \$50,000 was deposited in the bank account in the Banco Continental, he did not consider it to be his money but rather either Mr. Wilson's or the corporation's [R. T. 956]. After the January attempt to withdraw the money from Banco Continental by check, Appellant did nothing more until July 1959 [R. T. 958]. Appellant stated that he went to Cuba in July 1959, and received \$42,000, consisting of three cashier's checks in Cuban pesos. These checks were in the amount of \$14,000 each [R. T. 962-964]. At the time Appellant received these checks he considered the funds to be Mr. Wilson's money. Appellant testified that in July following his return from Cuba, he had an opportunity while in Miami, Florida to discount the \$42,000 worth of cashier's checks for approximately \$30,000. He considered the proposition and turned it down [R. T. 965]. Appellant testified that after he learned the checks were seized by the Cuban government, he told Mr. Wilson that he felt "very badly", that he had malpractice insurance, and suggested that Mr. Wilson bring a claim against Appellant so that the insurance company could suffer the liability [R. T. 972]. Appellant testified that up until the time the money was confiscated he thought it was Mr. Wilson's. "When it was confiscated I thought it was mine." [R. T. 973]. In response to the question, "When the deduction was taken in the 1959 tax return why did you take it for \$42,000 instead of \$50,000?"

Appellant answered: "Because \$42,000 is what I have lost out of confiscation." [R. T. 975].

2. Understatement of Income

The 1959 return filed by Appellant and his wife on December 12, 1960, stated that Appellant's gross income for 1959 was \$69,485.32. The government contended at trial that Appellant willfully failed to include as part of his gross income for 1959, an additional \$32,999 and that Appellant's gross income for 1959 was \$102,484.25. The additional \$32,999 was comprised of \$3,000 - paid to Appellant by Henry Ventura and \$29,000 paid to Appellant by Atwood Richards, Inc.; Total - \$32,999. During counsel's closing argument the court indicated that it did not accept the testimony of Mr. Henry Ventura relative to the \$3,000 of income to Appellant for 1959. The government therefore will not review the facts relating to this particular item in view of the relatively small amount of this item and the court's observation. Additionally, as is discussed supra, during the trial Appellant admitted there was an additional \$15,641 of fees not reported on the 1959 return which resulted from Appellant's receipt and sale in 1959 of Goldfield Rand stock, discussed infra [R. T. 737].

a. The Atwood Richards Trans-
 actions.

On March 30, 1959, Appellant as an officer of Volume Industries, a California corporation (which was at this date suspended for nonpayment of taxes) negotiated with and signed a contract (Exhibit 7A) with Tom Corradine and Associates, a motion picture distributor. Under the terms of this contract Volume Industries, Inc. received the rights for a period of two years to 90 "Little Rascal" films for \$15,000 [R. T. 56]. Under the terms of the contract payments were to be made from Volume Industries, Inc. All the negotiations in connection with this transaction were conducted by Appellant who instructed Mr. Tom Corradine to indicate Volume Industries, Inc. as the purchaser in the contract [R. T. 66].

In May 1959, Appellant then negotiated with John T. Reynolds, who was a vice-president of KHJ-TV, concerning the exchange of the right to show the "Little Rascal" film series for time on KHJ-TV. As a result of these discussions, a "trade deal" was made wherein KHJ-TV delivered to Volume Industries, Inc., a total of 1,248 spot announcements in exchange for the rights to telecast the "Little Rascals" on KHJ-TV [R. T. 73, Exhibits 8A and 8B]. Mr. Reynolds dealt only with Appellant [R. T. 278] and never met any other person at Volume Industries, Inc. Reynolds testified that Appellant had approached him on other occasions about similar types of deals [R. T. 274].

Appellant, via Volume Industries, Inc., then entered into

an agreement (Exhibit 9A) in May 1959, with Atwood Richards, Inc. (hereafter "Atwood"), whereby Atwood paid \$49,999.92 to Volume Industries, Inc. for the 1,248 spot announcements on KHJ-TV [R. T. 151]. The payment involved two checks totaling \$15,000, and 12 notes payable in the amount of \$2,916.60 each. These notes, which were non-interest bearing, were given to Appellant in June 1959, and payable on a monthly basis thereafter. All the negotiations between Atwood and Volume Industries were conducted by Appellant [R. T. 149]. Under the terms of the assignment agreement (Exhibit 9A) Atwood paid \$15,000 cash and executed 12 monthly promissory notes, each in the amount of \$2,999.66 (Exhibit 9C). Between June 8 and August 3, 1959, Appellant received a total of \$20,833.32 from Atwood (\$15,000 cash and payment of 2 notes).

Mr. Jaques M. O'Rourke, who was President of Peoples Finance & Thrift Company of Beverly Hills in 1959, testified that Appellant approached him with a letter dated July 29, 1959 (Exhibit 10A2), which assigned the Atwood notes from Volume Industries to Appellant. Effective July 29, 1959, Appellant assigned to Peoples Finance & Thrift Company the \$29,166.60 worth of notes (10 notes, each in the amount of \$2,916.66). Under this arrangement with Peoples Finance & Thrift Co., Appellant realized \$24,000 and Peoples Finance & Thrift received \$5,000 as their discount fee [R. T. 119, 121, Exhibit 10A2).

The income Appellant received from the transaction as computed by the government was as follows:

<u>Exhibit</u>	<u>Date</u>	<u>Amount</u>	
9C	6/8/59	\$ 13,000.00	(check)
9C	6/10/59	2,000.00	(check)
9C	7/1/59	2,916.66	(note)
9C	8/3/59	2,916.66	(note)
9C	7/29/59	<u>29,166.60</u>	Ten notes in amount of \$2,916.66 were assigned to the Peoples Finance & Thrift Company
		\$ 49,999.92	
7A		15,000.00	Cost of acquisition of "Little Rascals"
		\$ 34,000.92	
10G		5,000.00	Cost of discount by Peoples Finance & Thrift Company
PROFIT		\$ 29,999.92	

Although the contracts concerning the purchase, sale and assignment of the rights of the "Little Rascals" were all negotiated in the name of Volume Industries, Inc. they were negotiated solely by Appellant. At the time Appellant was negotiating with Mr. Corradine, Mr. Reynolds, Mr. Rosenblatt, and Mr. O'Rourke, Volume Industries, Inc. existed in name only as Volume Industries, and had been suspended in the State of California for non-payment of taxes on January 2, 1958 (Exhibit 4B). On September 21, 1959

(after the above negotiations were transacted), Volume Industries corporation was revived by the issuance of a notice of revival (Exhibit 4C). In addition to Appellant, the other directors of Volume Industries, Inc. signed the Articles of Incorporation, i. e., Frank Stillman, Charles S. Paul and Pauline Sherry, solely as a matter of accommodation for Appellant and were directors in name only. No directors' meetings and/or shareholders' meetings were ever held to the knowledge of these individuals and they received no salary for holding the position of directors [R. T. 132-135, 142-144, 181]. Volume Industries, Inc. never issued any stock [R. T. 181], nor did it have a book of stock certificates [R. T. 182]. Volume Industries, Inc. filed no corporate tax return during the years 1958-61. In a letter to the Internal Revenue Service dated April 29, 1964 (Exhibit 11) in response to a subpoena requesting certain records from Volume Industries, Appellant stated that he did not have the records and "Volume Industries, Inc. is defunct and actually never operated as a corporation" (emphasis added).

b. Income From Goldfield Rand
 Stock.

Appellant's accountant, Mr. Melvin Singer, testified at the trial that in addition to the fee income in the amount of \$69,485.00, Appellant received as a fee Goldfield Rand Stock ^{3/} which he sold

^{3/} Agent Abels noted this on his capital gains schedule (Exhibit 21A).

in 1959 and realized the sum of \$15,641.22 which was not reported on Appellant's return, but which was reflected in Appellant's books and records [Exhibit 12A-K, R. T. 737, 825]. Appellant on cross-examination admitted that he received this sum and that it was not reflected on his return [R. T. 128].

c. Testimony of Revenue Agent
 Abels.

Robert M. Abels, the Revenue Agent who made an audit of Appellant's books [Exhibits 12A-K, R. T. 380-381] for the years 1956-59, reconciled the income from the books with the income reported for the year 1959 from Appellant's 1959 return (Exhibit 1B). Mr. Abels testified that there was no income reported in Appellant's records from Atwood, Peoples Finance & Thrift Company, Tom Corradine and Associates, John Reynolds or KHJ-TV (Exhibit 1D) and that the 1959 return reflected no income to Appellant for this transaction [R. T. 388].

Agent Abels testified that Appellant's books were a standard double entry system consisting of a general ledger, general journal, cash receipts record, cash disbursements record, revenue record, accounts receivable ledger, and a payroll record. Agent Abels made a reconciliation of the \$67,485.03 reported on Appellant's 1959 tax return (Exhibit 1B) in a lum sum as legal fees, with the fees recorded on Appellant's books and arrived at an itemized list which reflected the client and the amount paid and totaling the sum

of \$67,485.93. In making this reconciliation, Abels notes \$2,000 salary from Wilson Mortgage Company, which was reflected separately on Appellant's 1959 return, and an item in account 403 of the books entitled "Miscellaneous Income", in the amount of \$2,227.77, which sum was not reflected on the return. ^{4/} Exhibit 19 sets forth the recapitulation of Appellant's book, which reflects a total income per books of \$71,730.70.

Even though the government conceded before the court that the expenses claimed on the return were not contested for the purpose of this case, Appellant insisted upon cross-examining Mr. Abels, over government objection, on what the books reflected [Exhibit 12 series, R. T. 406-409], and what Mr. Abels' analysis of the books showed. Mr. Abels testified that the sum total of the expenditures reflected in the books, indicated expenditures in the amount of \$109,121.62 [R. T. 391]. Although the books reflected a greater amount of expenditures than did the return, Mr. Abels testified that his analysis of the books indicated that Appellant had overstated his expenses and losses per books (aside from the Cuban bank account transaction and Atwood Richards matter) in the amount of \$19,716.00. As the Barnhardt Morrow loan of \$21,649.46 claimed on the return was only substantiated in the books in the amount of \$10,267.13, this resulted in an overstatement in the amount of \$11,382.00. The books reflect that Appellant's advance costs were approximately \$26,000, while Appellant claimed on his

^{4/} This sum was not included in the indictment and is not included in the computations herein.

return that his advance costs were \$34,577.75, making a total of approximately \$19,000. The net effect of this has reduced Appellant's loss in the approximate sum of \$5,913.28, below that reported on his return [R. T. 503]. Appellant on his 1959 report did not report any capital gains or losses. However, in cross-examination the question of Appellant's books reflecting capital gains or losses was raised. On redirect Agent Abeles was asked whether Appellant's books reflected the purchase and sale of stock, and testified that in his examination Appellant's books reflected stock purchases, which indicated a capital gain of approximately \$43,000 ^{5/} which was not reported on Appellant's return [R. T. 495, Exhibit 21A]. Agent Abels testified that for the purposes of this case the government gave Appellant full credit for all expenses stated on his return [R. T. 390, 391].

d. Summary

Based on the addition of the sum Appellant realized through the sale of "Little Rascals" film series to Atwood Richards and the Goldfield Rand Stock which Appellant received as a fee in 1959 and sold for \$15,641, Appellant's 1959 tax return should have reported:

^{5/} For the purposes of streamlining the Government's case, this sum was likewise not charged in the indictment.

Appellant's reported income	\$ 69,485.00
Goldfield Rand Stock (Not Reported)	15,641.00
Appellant's income from Atwood Richards (Not Reported)	29,999.92
Corrected Income	115,125.00
Applying Appellant's losses as reported except for Cuban Bank Account:	
Appellant's reported expenses from legal practice	(93,862.25)
Loan to Barnhardt Morrow Corp.	<u>(21,649.46)</u>
	(115,511.71)
Corrected losses	(115,511.71)
Corrected Income	<u>(115,125.00)</u>
Correct net operating loss	\$ (386.71)

Applying this net operating loss and carrying it back against Appellant's reported income for the year 1956, for which year he reports a net income of \$16,923.27, the entire loss is used so that there is no operating loss to carry forward to the years 1957 and/or 1958 [R. T. 399].

IV

ARGUMENT

In view of Appellant's allegations of error relating to the insufficiency of the evidence on all counts of the indictment, it is appropriate to note a remark made by Judge Hall:

As I stated during the trial I tried to find every way that I could to resolve the evidence against

the government and in favor of the defendant, but to me it seemed so overwhelming that I could not
[R. T. 1266, emphasis added].

It is, of course, fundamental that this Court must view the evidence together with all reasonable inferences in the light most favorable to the government. Noto v. United States, 367 U.S. 290 (1961) and Byrne v. United States, 327 F.2d 825 (9th Cir. 1964).

When the evidence is so viewed it indicates a willful and deliberate effort on the part of Appellant to purposely file a false tax return; thus, using, by means of a false carryback adjustment and claims for refund, the return as a vehicle for fraudulently reaching into the coffers of the United States Treasury.

A. THE EVIDENCE WAS SUFFICIENT TO
CONVICT APPELLANT OF UNDER-
STATING HIS INCOME AND OVER-
STATING HIS NET LOSS ON HIS 1959
TAX RETURN.

The gist of the offense charged in Count One, i. e., violation of 26 U. S. C. §7206(1) is the willful making and subscribing of a tax return, which the signatory does not believe to be true and correct as to every material matter. Blumfield v. United States, 306 F.2d 892 (8th Cir. 1962). In creating the provisions in the Revenue Act of 1942 (cf. 619, 56 Stat. 798, §196) Congress was retaining the affect of the perjury statute which became inapplicable to tax returns by reason of the coincidental elimination of the requirement that such

returns be made and signed under oath. Cohen v. United States, 201 F.2d 386, 393 (9th Cir 1953), cert. denied 345 U.S. 951.

In United States v. Rayor, 204 F. Supp. 486 (D.C. S.D. Cal. 1962) with regard to 26 U.S.C. 7206 (1), it was held that the government is not required to prove that an additional tax is due and owing for the year in which the false statement was made, since the existence of a tax liability is not an element of this offense. Judge Yankwich stated at pages 491-492:

. . . (T)he Internal Revenue Service, if it is to audit properly the return and allow or disallow claimed deductions, must have complete and truthful disclosure

Consequently, what is claimed as deductible from gross income must be stated truthfully as of utmost materiality. No doubt, this is the reason why Section 7206(1) stresses relief in the truthfulness and correctness of the statement to which the written declaration or verification is attached. Where truth is not present, the section is violated. Materiality in matters of this character lies in the "intent to protect the authorized functions of the governmental departments and agencies from the perversion that might result from the deceptive practices described (U.S. v. Gilliland, 312 U.S. 86, 93 (1941)).

1. Appellant On His 1959 Tax Return Willfully and Knowingly Claimed a Loss of \$42,000 Which He Did Not Sustain.
-

The fraudulent understatement of taxable income can result from the taking of false deductions. United States v. Ragen, 314 U. S. 513 (1941); United States v. Lennon, 246 F.2d 24 (2nd Cir. 1957).

The evidence overwhelmingly establishes that the \$50,000 deposited in the Banco Continental in Havana, Cuba in December 1958, was the sole property of Mr. George Wilson. Appellant's explanation that up until the time the remaining \$42,000 was confiscated by the Agarian Land Reform in Cuba (August 1959), Appellant believed the money was Wilson's, but after it was confiscated, "I felt it was mine" [R. T. 973] is patently absurd. Particularly so, when Appellant admitted that Wilson never looked to him for repayment, never demanded repayment, never received payment from Appellant, and Appellant's own books did not reflect this sum as liability. Further, this alleged liability is nowhere to be found in a financial statement which Appellant on December 9, 1959, gave to the Security First National Bank (Exhibit 25).

Appellant spoke at length with his accountant, Mr. Lebe, in 1960 who continually told Appellant that he could not claim the \$42,000 loss. Lebe finally told Appellant that if he insisted upon claiming this loss on his 1959 return Lebe would not sign it. However, Appellant stated to Lebe "you prepare it and I'll sign it"

which is exactly what Appellant did [R. T. 537, 538]. More compelling proof of willfully and knowingly making a false statement cannot be imagined and the court under the evidence before it could have made no other finding than it did.

2. Appellant On His 1959 Tax Return
Willfully and Knowingly Understated
His Gross Income In a Sum In Excess
of \$33,000.

Section 61 of Title 26, United States Code, provides in pertinent part that " . . . gross income means all income from whatever source derived . . . ". Section 63 of Title 26, United States Code, provides in pertinent part " . . . the term 'taxable income' means gross income, minus the deduction allowed. . . ".

As was noted in the Statement of Facts, the court indicated it was disregarding an income item in the amount of \$3,000, which the government sought to prove had been received by Appellant from Henry Ventura. This reduction did not affect the government's case for the reasons that (1) the government was not required to prove the exact amount alleged omitted, but only a substantial amount, United States v. Johnson, 319 U.S. 503 (1943), cert. denied 320 U.S. 808; (2) Appellant's admission through the testimony of Mr. Singer (Appellant's accountant at trial) established that the 1959 tax return did not include \$15,641 fee income, received in 1959 in the form of Goldfield Rand stock which increases the omission in gross income to approximately \$45,000 (\$29,999 Atwood Richards

transaction plus \$15,641).

a. Income From Atwood Richards.

The income from the Atwood transaction resulted in taxable income in the amount of \$29,999.99 comprised of \$15,000 and twelve notes in the amount of \$2,916.00 with regard to the receipt of notes by a taxpayer. 26 C.F.R. 1.61-2(d) provides in pertinent part:

(1) If services are paid for other than in money, the fair market value of the property or services taken in payment must be included in income

(4) . . . Notes or other evidence of indebtedness received in payment for services constitute income in the amount of their fair market value at the time of transfer. A taxpayer receiving as compensation a note regarded as good on its face at maturity, but not bearing interest, shall treat as income as of the time of receipt its fair discounted value computed at the prevailing rate. See First National Bank v. Commissioner of Internal Revenue, 107 F.2d 143 (6th Cir. 1939).

The testimony of Mr. Corradine, Mr. Rosenblatt, Mr. O'Rourke and Mr. Reynolds clearly established that the profit to Appellant as a result of amounts received by Appellant through his acquisition

and sale of the "Little Rascals" film series was \$29,999. Volume Industries, Inc., in whose name the requisite negotiations were transacted, was, by Appellant's own admission, a defunct entity which never operated as a corporation (Exhibit 11).

Contrary to Appellant's assertion at page 10 of his brief that the books (Exhibits 12A-12K) reflect income from Volume Industries to Appellant, it must be noted that account 201 of these books is entitled "notes and loan payable" and does not reflect income items. This account reflects that Appellant received loans from Volume Industries, Inc., which were recorded as liabilities in account 201 as follows:

<u>Date</u>	<u>Amount</u>
6/10/59	\$ 11,500.00
6/15/59	1,675.00
7/14/59	1,900.00
8/7/59	<u>2,900.00</u>
	\$17,975.00

The receipt of \$17,975.00 from Volume Industries, Inc. was not reflected as income on Appellant's books, but as loans payable to Volume Industries, and these loans were never paid by Appellant [R. T. 467]. Appellant deposited all the proceeds from the "loans" from Volume Industries, Inc. into his personal checking account at the Citizens National Bank (Exhibit 6B). Appellant then caused Volume Industries to assign the remaining (10) notes to himself, which he in turn discounted with Peoples Finance & Thrift Corp. (Exhibit 10A-2). In view of the facts presented at trial, it is

apparent that Appellant was attempting to use account 201 as a vehicle of evading tax rather than as an income account as implied by counsel.

By the testimony of his accountant, Mr. Melvin Singer, CPA, Appellant at trial in fact conceded that the \$29,999 from Atwood Richards, Inc. should have been reported on the 1959 tax return [R. T. 711]. Mr. Singer included this item in his recompilation of Appellant's income and expenses for 1959, which is set forth in Appellant's Exhibit Z49 at page 3 under the heading "Sale of Film -- the 'Little Rascals' ".

b. Income From Goldfield Rand.

Mr. Singer, who testified he spent approximately six months in auditing Appellant's records [R. T. 709-710], testified that based on his computations examination of Appellant's books and records and conversation with Appellant, Appellant had additional income which was not reported on the return in an amount of \$22,533.00 (which included the Atwood Richards transaction) capital gains and \$15,641 fee income. This latter item resulted from the sale of Goldfield Rand Stock, which Appellant received as a fee in 1959 and sold the same year [R. T. 736, 737]. In fact, Appellant did not even report any capital gains or losses on his 1959 return (Exhibit 1D). These two items conclusively establish that in his 1959 tax return Appellant grossly understated his income in the amount of \$45,641 and make inescapable the court's finding that Appellant willfully

omitted these items from his return thus understating his gross income by that amount.

3. Summary

A comparison of Appellant's 1959 tax return with the evidence adduced at trial, indicates the following:

	<u>Per Return</u>	<u>Per Trial</u>
Income		
Fees - Legal Practice	\$ 69,485	\$ 69,485
Goldfield Rand Stock	- - -	15,641
Other		
Atwood Richards	- - -	29,999
TOTAL INCOME	\$ 69,485	\$115,125
Business Expense (Net)	93,862	93,862
Other Business (Losses)		
Cuban Account	(42,000)	- - -
Loan to Barnhardt	- - -	- - -
Morrow defunct	(21,649)	(21,649)
NET LOSS	(\$88,026)	(\$386)

B. THE EVIDENCE SUPPORTS THE COURT'S FINDING THAT APPELLANT, BASED UPON HIS 1959 TAX RETURN, SUBMITTED A FRAUDULENT CLAIM FOR REFUND IN THE YEARS 1957 AND 1958 (COUNTS 2 AND 3).

Counts 2 and 3 charged a violation of 18 U.S.C. §287 which is commonly referred to as the "false claims clause" of the "False Claims Act". Provisions of §287 were formerly included in 18 U.S.C. §80; the other part of former 18 U.S.C. §80, containing what is often referred to as the "false statement clause" now appears in 18 U.S.C. §1001. Grainger v. United States, 346 U.S. 235 (1953). This statute proscribes the making or presenting of a claim, knowing it to be false or fraudulent.

Appellant in Counts 2 and 3 was charged with the presenting of a claim for refund, Form 843, and application for carryback adjustment, which was based upon his net operating loss claimed in his 1959 return.

Section 172 of the Internal Revenue Code, 26 U.S.C. §172, allows a taxpayer to deduct his net operating losses from his trade or business, as a deduction against prior income. The net operating loss can be carried back three years and is first carried back to the earliest of the three years. If it is not entirely used to offset income in that year, it is carried forward to the second year preceding the loss year, and any remaining amount is next carried to the taxable year immediately preceding the loss year.

In 1956, Appellant and his wife filed a joint return. In 1957

and 1958 Appellant filed a separate return and in 1959 filed a joint return (Exhibits 1A-1D).

The net income per returns for 1956-58 reported Appellant's taxable income as follows:

1956	-	\$ 17,723
1957	-	33,100
1958	-	8,778

The net operating loss of Appellant for the year 1959 has been proven to be \$386 rather than \$88,026, which he claimed. Therefore, he has no loss to apply against his 1957 and/or 1958 income and accordingly his claim is false. Evans v. United States, 11 F.2d 37 (4th Cir. 1926). See also United States v. Knapp, 302 U.S. 214 (1937).

The narrative summary in the Statement of Facts, and in Argument abundantly establishes that Appellant's claims for refund in 1957 and 1958 were knowingly and fraudulently made and presented and that he was properly convicted on Counts 2 and 3.

C. THE COURT DID NOT COMMIT
PREJUDICIAL ERROR IN EXCLUDING
EVIDENCE AS TO APPELLANT'S
INCOME AND EXPENSES FOR THE
YEARS 1956, 1957 AND 1958, OR FOR
YEARS SUBSEQUENT TO 1959.

The claim for refund, Claim Form 843 and application for tentative carryback adjustment for 1957 and 1958 (Exhibits 2A, 2C, 2D), stated that Appellant's application for refund was based upon a

net operating loss for the calendar year 1959, in the amount of \$88,026.68. On page 2 of the application for tentative carryback loss the computations relating to the previous years for which a refund is requested are set forth, together with the adjustments affected by the carryback at the loss.

At trial, Appellant attempted to offer the testimony of Mr. Singer to prove that Appellant's returns, per Mr. Singer's calculations, were not correct and the following colloquial ensued:

THE COURT: You propose to prove by this witness that his income tax return for 1956, '57 and '58 did not correctly reflect his income in that he had greater losses in those years than he showed?

MR. PIC'L: Partially. There are some minor adjustments that were necessary in those years. They do affect the loss carryback in 1959 insofar as it relates to Counts 2 and 3.

THE COURT: The important year here is the year 1959. The important thing is whether or not he did or did not have the losses which he claimed in 1959.

MR. PIC'L: Perhaps I might make an offer of proof, your Honor, to explain why it is that these previous years' returns are necessary.

I believe the returns that have been submitted show a taxable income in 1956 of approximately \$17,000, '57 was approximately \$33,000 and 1958

was between eight and nine thousand. Because of some minor adjustments the return for 1958 instead of showing a taxable income between eight and nine thousand should have shown a loss of approximately \$24,000 which would have been carried back to 1956 and completely eliminated the \$17,000 taxable income in that year. There remained approximately \$9,000 of loss which could have been carried into 1957.

The 1957 income was \$33,000 after deducting the \$9,000. There was \$24,000 of taxable income in 1957 and none in '58.

Then when the 1959 return is correctly computed as this witness has done and will so testify, the carryback from 1959 no longer has to go to '56 and not to '58 but rather through '58 to '57 to the amount of \$24,000 and then carried forward.

Significance of the 1960 computations is that regardless of what occurred in 1959 the time of the filing of the return in December of '60, an additional loss occurred which was within the knowledge of the defendant.

Those losses he was entitled to carry back to '57, '58 and '59 if there had been taxable income.

This will tend to show lack of intent upon the part of defendant insofar as relates to Counts 2 and 3.

The witness's testimony as to 1959 will explain in part why the defendant believed the return to be accurate when he signed it.

THE COURT: I do not think that that testimony is admissible, counsel. I think we are concerned here with the 1959 statement at the time he made it out and with the application, the intended application, for a tentative carryback which he filed and which is now in evidence as Exhibit 2-A and the applications for refunds or reductions, whatever you might call them. [R. T. 606-608].

The material which Appellant sought to introduce relative to the incorrectness of Appellant's tax return 1957 and 1958, thereby impeaching his tax returns for those years, was neither relevant nor material to the false claims for refund in 1957 and 1958, since the false claims were based upon the false operating loss which Appellant claimed on his 1959 tax return. To be "relevant" means to relate to the issue. To be "material" means to have probative weight, i. e., likely to influence the tribunal in making a determination required to be made. Weinstock v. United States, 231 F.2d 699, 701 (D.C. Cir. 1956).

Assuming arguendo that Appellant would have established a loss for the year 1958 (the return he filed for that year reflected taxable income of \$8,778.92) this would not have altered the fact that his claim for refund was presented and the refund granted on

the basis of the nonexistent net operating loss claimed on his 1959 return.

Judge Yankwich's observations in the case of United States v. Rayor, supra, that:

. . . The Internal Revenue Service, if it is to audit properly the return and allow or disallow claimed deductions must have complete and truthful disclosure . . . the auditing of the return, in the light of the returns for other years, which later developed that the omission of these falsely claimed deductions would have made no difference in the defendant's tax liability for the year [in question] cannot be retrojected to the date of the false statement, so as to confer verity on it,

is equally appropos to Appellant's claims for refunds.

The government was entitled as of the date Appellant claimed refunds and applied for tentative carryback adjustment were filed, to the basis upon which Appellant made his claim. Once the stated basis is shown not to exist, the claim is false. Evans v. United States, 11 F.2d 37, 39 (4th Cir. 1926). In Evans, the court affirmed the conviction of Evans for filing a false claim for refund and stated:

The statements [in the claim for refund] were obviously made for the purpose of showing compliance . . . and were intended to be considered by the Commissioner as a part of the claim in passing

upon the demand for refund. Claims against the government invariably and necessarily consist of statements of fact in connection with demands for payment, and it would be a perversion of language to say that a false statement of fact made in connection with the demand and as the basis thereof, does not constitute a false claim within the meaning of the statute.

Appellant sought to establish and claim his right to a refund on the basis of his 1959 return and in fact secured a refund of the taxes paid in 1957 and 1958. He could not thereafter seek to impeach the very documents upon which he asked the government to rely. United States v. Rayor, supra; United States v. Knapp, supra; C. F. Kay v. United States, 303 U.S. 1 (1937).

In United States v. Stoehr, 196 F.2d 276 (3rd Cir. 1962), cert. denied 344 U.S. 826, a prosecution for tax evasion (26 U.S.C. 7201) for the years 1943, 44 and 45, it was held that the trial court properly excluded defendant's tax return for 1946, as well as defendant's offer in 1948 to compromise his tax liability for these years by paying \$350,000. The court stated that when a defendant offers evidence consisting of subsequent statements and conduct to show his mental state, the trial court:

'in making its ruling must consider the circumstances of the individual case. Its inquiry in each instance must be: Is the evidence of defendant's subsequent mental state (which evidence is supplied by the

subsequent act) of any probative value in establishing his state of mind at the time of the alleged criminal act, and if so does the evidence not unduly entangle the issue or confuse the jury? If the defendant . . . had promptly filed an amended return and made payment of the additional sum owed we think such evidence may well have been admissible.

While the Government must prove additional tax due and owing in a prosecution for tax evasion, 26 U.S.C. §7201, Holland v. United States, 348 U.S. 121 (1954), a tax liability is not a prerequisite to conviction for either 26 U.S.C. §7206(1), United States v. Rayer, supra, or 18 U.S.C. §287, Evans v. United States, supra. The gravamen of these offenses is not whether the Government is actually defrauded, suffers monetary loss, or even is induced to act, Browder v. United States, 268 F.2d 364 (9th Cir. 1959), but rather it is the untruthfulness stated in the document submitted which is calculated to work a deceptive practice upon the governmental agency involved; and when truth is not present the sections are violated.

Although defendant was a practicing attorney in 1960, 61, 62 and 64 [R. T. 1125] from 1960 through 1964 Appellant filed no income tax returns [R. T. 1022]; nor did he file any amendments to his 1956, 57, 58 and 59 returns [Ex. 1A through 1D). The attempt of Appellant six years later - at the time of trial - to suddenly recast what he had reported in his tax returns for 1956, 57 and 58 and what

he did not report in 1960 through 1964 (he testified he stopped maintaining books and records in July, 1960 [R. T. 1178]) could not be of any probative value to the court in determining what Appellant's intent was as of December 10, 1960, when Appellant filed his 1959 return and claims for refund.

V

CONCLUSION

Appellant in the conclusion of his brief alludes to his position as an attorney and the attendant consequences of his conviction on his profession. The court below was extremely conscious of this fact and the Reporter's Transcript amply demonstrates that Appellant was given every consideration by the learned trial judge who found that the evidence overwhelmingly demonstrated Appellant's guilt.

In view of Appellant's reference to his position as a member of the bar, this Court's attention is specifically invited to Appellant's testimony [R. T. 856-1186] which can only be characterized as shocking; a few examples are:

(a) Appellant didn't realize his 1959 return was not an accurate portrayal of his books until the time of trial [R. T. 917].

(b) Income from Atwood Richards was not reported on his 1959 return as Appellant didn't advise Mr. Lebe because "I forgot about it" [R. T. 930].

(c) Volume Industries never filed a tax return in 1960 because it "never occurred to me" [R. T. 932].

(d) At the time Appellant signed his 1959 return, he didn't realize he didn't include a capital gains and loss schedule [R. T. 933].

(e) Until the time of trial, Appellant didn't realize Mr. Lebe hadn't signed his 1959 return [R. T. 1005].

(f) In testifying to an alleged loss in 1959 on the sale of Trans Union Stock, he stated "I decided I had that loss the other day" [R. T. 1058].

(g) In 1959 and 1960 Appellant never examined the books and records maintained in his office [R. T. 1007-1008].

(h) Appellant never filed tax returns from 1960 through 1963 because "I didn't have any income, I sustained additional losses, I had as I say this alcoholic problem and then this investigation started" [R. T. 1023].

Appellant's testimony is in direct contradiction in many material respects to that of the other witnesses in the trial. In fact, Appellant even contradicted the computations arrived at by his own accountant, Mr. Singer [R. T. 1052]. A typical example of the patent falsity of Appellant's testimony is his testimony that in 1959 he loaned Mr. Eugene A. Easton \$7,000 which was not repaid, and "I am therefore entitled to deduct it in 1959". The \$7,000 was so deducted in Mr. Singer's and Appellant's recomputations [R. T. 997]. Mr. Easton, a rebuttal witness, completely contradicted Appellant by testifying that the \$7,000 received from defendant was not a loan, but rather reimbursement to Easton out of corporate funds for corporate expenses [R. T. 1200]. If a single moment of truth

occurred in Appellant's testimony it was when he admitted that in 1959 he had no qualms at all about making false statements about financial matters [R. T. 1184].

The Government submits that the record completely demonstrates that Appellant was properly convicted of the offenses charged, and that Appellant's conviction should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Robert L. Brosio

ROBERT L. BROSIO

No. 21,372 ✓

United States Court of Appeals
For the Ninth Circuit

HENRY JACOBOWITZ,

Appellant,

vs.

DOUBLE SEVEN CORPORATION,

Appellee.

On Appeal from the United States District Court
for the District of Arizona

APPELLANT'S OPENING BRIEF

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No. 21,372

**United States Court of Appeals
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HENRY JACOBOWITZ,

Appellant,

vs.

DOUBLE SEVEN CORPORATION,

Appellee.

**On Appeal from the United States District Court
for the District of Arizona**

APPELLANT'S OPENING BRIEF

STATEMENT OF JURISDICTION

This is an appeal by an attorney for a bankruptcy trustee from an Order of a bankruptcy Referee—as affirmed by a District Court—setting his fee for legal services rendered to the trustee in the course of administering a bankruptcy estate.

The Referee's jurisdiction to set the fee rests on §38(6), 11 U.S.C. §66, of the Bankruptcy Act.

The District Court's jurisdiction to review the Order of the Referee rests on §39c, 11 U.S.C. §67, of the Bankruptcy Act.

This Court's jurisdiction rests on §24a, 11 U.S.C. §47, of the Bankruptcy Act.

STATEMENT OF THE CASE

On September 17, 1965, almost three and one-half years after his appointment as counsel for the bankruptcy trustee, appellant was awarded a fee of \$7,500.00 out of a requested fee of \$11,410.00. Significantly, the Referee found that the requested fee was a reasonable one, based upon the value of legal services in this locality when rendered in ordinary civil proceedings, but concluded that since a totally different standard applies in bankruptcy proceedings, the fee should be only \$7,500.00 (T.R. 23-24).¹

On September 17, 1965, appellant filed with the District Court an informal application for a reconsideration of the fee (T.R. 1-3). On October 6, 1965, it was summarily denied (T.R. 17).

On November 8, 1965, on the formal Petition for Review (T.R. 20), the Order of the Referee was reversed and the fee was allowed in the amount prayed for (T.R. 161).²

On November 23, 1965, the Order of the District Court dated November 8, 1965, reversing the Order of the Referee, was vacated and the matter was transferred to the Honorable C. A. Muecke (T.R. 162), the Judge who had previously denied appellant's application for a reconsideration of the fee.

On December 13, 1965, on motion of the appellant (T.R. 163), the matter was remanded to the Referee

¹See, Appendix, p. i.

²See, Appendix, p. iii.

for the purpose of hearing additional testimony “touching upon the reasonableness of the fee”.

Such testimony was heard by the Referee on January 14, 1966,³ and thereafter, by an Order dated June 29, 1966, he set the fee once again at \$7,500.00 (T.R. 166-169).⁴

On review of this Order, on August 23, 1966, the District Court, while deleting the criterion that led the Referee to reduce appellant’s fee from \$11,410.00 to \$7,500.00, nevertheless affirmed the award of the Referee (T.R. 170).⁵

On September 9, 1966, appellant perfected this appeal (T.R. 171).

The principal issues before this Court are:

1. Is it an abuse of discretion to award an attorney for the bankruptcy trustee a fee which is admittedly less than fair and reasonable simply and solely because his services were rendered in a bankruptcy proceeding?
2. Is it an abuse of discretion to use abstract statistics, not part of the record, as the sole and controlling criterion in determining what is a fair and reasonable fee under the circumstances of a particular case?

³The transcript of this hearing is part of the record. Reference to said transcript will herein be designated by “T.P.”

⁴See, Appendix, p. iv.

⁵See, Appendix, p. ix.

SPECIFICATIONS OF ERRORS

1. The Referee and the Distict Court erred in awarding appellant a fee that is admittedly less than fair and reasonable simply and solely because his services were rendered to a bankruptcy trustee in a bankruptcy proceeding.

2. The Referee and the District Court erred in awarding appellant a fee that is less than fair and reasonable in the light of the minimum rates prescribed by the local Bar Association, although the services were admittedly exceptional.

3. The Referee and the District Court erred in awarding appellant a fee that is less than fair and reasonable under settled bankruptcy principles.

4. The Referee and the District Court erred in permitting abstract and unverified statistics, not part of the record, to be the controlling criterion in determining the quantum of appellant's fee.

SUMMARY OF ARGUMENT

1. All authorities agree that an attorney for a bankruptcy trustee is entitled to a fair and reasonable fee for necessary professional services competently rendered.

The fee allowed herein, as we shall demonstrate, is grossly unfair and unreasonable under any judicially accepted criterion.

2. Liquidating bankruptcy estates, as distinguished from Chapter X and XI estates, are administered

strictly for creditors, i.e., not for debtors or specialty groups. Such creditors, as a rule, are more interested in paying an attorney a reasonable compensation for services competently rendered than in paying a meager compensation for mediocre services rendered.

In this case the services rendered by appellant have, as everyone agrees, greatly enhanced the assets of the estate. Consequently, the creditors affirmatively urged the Referee to allow the fee as requested. Logic and good sense dictate that the request of those at whose expense a fee is paid should be honored.

3. The use of irrelevant and abstract statistics to determine fees in bankruptcy proceedings—as was done here—without taking into consideration the many elements that go into the making up of a fair and reasonable fee is a clear violation of the mandate of this Court—and all appellate courts—which requires that a Referee use judicial discretion in setting such a fee. Statistics cannot be substituted for judicial discretion.

ARGUMENT

I. AN ATTORNEY FOR A BANKRUPTCY TRUSTEE IS ENTITLED TO A FEE THAT IS FAIR AND REASONABLE UNDER THE CIRCUMSTANCES OF THE PARTICULAR CASE, AND SUCH FEE NEED NOT BE LESS THAN WHAT WOULD BE GENERALLY AGREED IS REASONABLE FOR THE SAME OR SIMILAR SERVICES OUTSIDE OF BANKRUPTCY.

It is ironic that appellant, after having successfully fought the battles of his clients—the creditors—should be put to the task of battling once again, but this time

for the fruits of his efforts, i.e., for a just and fair fee for admittedly unselfish and productive services.

The irony is that this is not the typical case where the Referee has questioned the veracity of the attorney for the bankruptcy trustee, his ability in this field of the law, or the results which he achieved for the estate; nor is this a case where the creditors—or indeed a single one of them—were unhappy with the services rendered or the fee requested. To the contrary, the Referee acknowledges that the services rendered by appellant were ably and efficiently performed under most trying circumstances and that his efforts greatly enhanced the assets of the estate.⁶

As to the fee as prayed for, the trustee—himself an attorney and an experienced bankruptcy practitioner—testified that it is reasonable⁷ and recommended that it be allowed.⁸ The creditors, represented by a Creditors' Committee comprised of able and reputable local counsel, also thought the fee to be fair and reasonable and affirmatively urged the allowance thereof.⁹ The expert witnesses opined that it is most reasonable, and in fact, on the low side.¹⁰

It also should be noted that the fee requested by appellant is not one which he would command in private employment. As Mr. Warner, a general practitioner, testified, a reasonable fee for the services

⁶Referee's Findings of Fact Nos. 1 and 2, Appendix, pp. iv-v.

⁷Referee's Finding of Fact No. 3, Appendix, p. v.

⁸T.P. 48.

⁹Referee's Finding of Fact No. 4, Appendix, p. vi.

¹⁰Referee's Finding of Fact No. 5, Appendix, p. vi.

rendered by appellant in the four plenary actions alone would be in the area of \$12,000.00 to \$15,000.00.¹¹ According to appellant's testimony, his customary fee for services of this nature, in his private practice, is a minimum hourly rate of \$35.00, with an adjustment upward if the results of the employment prove to be of special benefit to the client.¹² Moreover, even the Referee concedes that a higher fee than the one requested by appellant would be justified, if his services were rendered in private employment.¹³

Finally, even from a bankruptcy point of view, the uncontroverted testimony of two eminent counsel of this area, Messrs. Stockton and Perry—representing almost one hundred years of experience—is that a fee of \$15,000.00, and upward, easily would be justified herein.¹⁴ In contrast, the fee requested by appellant is only \$11,410.00, and is based simply upon the *minimum fee schedule* of the Maricopa County Bar Association, i.e., at the rate of \$30.00 per hour or \$250.00 per day in Court, although the results achieved herein—said to be the ultimate test—would unquestionably warrant compensation beyond that of the minimum rate.

It is settled that fees for the trustee's attorney are allowable as an expense of administration under Section 62 of the Bankruptcy Act (11 U.S.C.A. §102). *In re Owl Drug Co.* (1936), 16 F.Supp. 139 (D.C.

¹¹T.P. 15.

¹²T.P. 50-51.

¹³T.P. 62.

¹⁴Referee's Finding of Fact No. 5, Appendix, p. vi.

Nev.), affirmed sub nom. *Cohen v. Elder*, 9 Cir., 90 F.2d 823. While the Act itself does not prescribe an objective criterion for determining the quantum of the fee, all authorities agree that it should be fair and reasonable under the circumstances of the particular case, and that such determination is left to the sound judicial discretion of the Bankruptcy Court. *In re Barceloux* (1935), 9 Cir., 74 F.2d 288; *In re Owl Drug Co.*, supra; *Sampsell v. Monell* (1947), 9 Cir., 162 F.2d 4; 3 *Collier on Bankruptcy*, 14th Ed., Sec. 62.12 [4] & [5]; 6 *Remington on Bankruptcy*, 5th Ed., Sections 2672 & 2673.

In commenting upon the special nature of this discretionary power, the Court, in *In re Owl Drug Co.*, supra, explained:

“... But this power ‘is not discretionary in the sense that the courts are at liberty to give *anything more* than a fair and reasonable compensation.’ Brewer, C. J. in *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.* (C.C. Mo. 1887), 32 F. 187, 188. And because extravagant costs of bankruptcy administration have been recognized as a ‘crying evil’ (*Realty Associates Securities Corporation v. O’Connor* (1935) 295 U.S. 295, 299, 55 S.Ct. 663, 79 L. Ed. 1446), judges have been warned by the Supreme Court against vicarious generosity in these matters. *In re Gilbert* (1928) 276 U.S. 294, 296, 48 S.Ct. 309, 72 L.Ed. 580.” 16 F.Supp. 139, 142.

What, then, are the ingredients or the elements of a *fair and reasonable fee* for the services of an attorney for the bankruptcy trustee within the framework of

the Act? This Court has held, in the leading case of *In re Barceloux*, supra, that in determining such a fee it is necessary that the following elements be considered, to-wit:

“... [1] the time spent, [2] the intricacy of the questions involved, [3] the size of the estate, [4] the opposition encountered, [5] the results achieved, [6] the opinion evidence touching the reasonableness of the fee, and [7] the economical spirit of the Bankruptcy Act itself (11 USCA).”
74 F.2d 288, 294.

It is readily apparent that these elements, except the last one dealing with the intangible economical spirit of the Bankruptcy Act, are the same as those which are employed in the determination of a fair and reasonable attorney's fee generally. Cf. *Monaghan v. Hill* (1944), 9 Cir., 140 F.2d 31; Canon 12 of the Canons of Ethics of the American Bar Association; 7 *Am.Jur.*2d, Attorneys at Law, Secs. 235-247; and 56 *A.L.R.*2d 13, 18-48.

Before discussing the legal effect and the appropriate application of the last element, that is, the economical spirit of the Act, it is important to note that this Court has included “the opinion evidence touching the reasonableness of the fee” as one of the requisite elements. On this point, all experts who testified agreed that the fee requested by appellant is extremely reasonable and indeed on the low side.¹⁵

¹⁵Referee's Finding of Fact No. 5, Appendix, p. vi.

Then, what effect does this unique element, the economical spirit of the Act, have upon the “fair and reasonable” criterion so often used in relation to fixing the quantum of attorney’s fees generally? Some authorities argue that it modifies that criterion so as to mean *something less than fees which would ordinarily be charged to private clients*, but they hasten to add, *not too much less*. As one Referee recently put it:

“In a nutshell, therefore, the quantum of the fee to be awarded in this case is in my discretion subject to the limitation that the fee be ‘reasonable’; by the term ‘reasonable’ is meant a fee less than that which would be received from a private client and yet not so much less that abler members of the bar will be driven from the field.” *In re Seed Marketing Association* (1964), 228 F. Supp. 812, 820 (D.C. Neb.)

At the same time, the National Conference of Referees in Bankruptcy—speaking for all Referees—strongly refutes this in its entirety. Said the Conference in its recent Editorial entitled “Bankruptcy Statistics and the Costs of Administration”, to-wit:

“... *It is frequently asserted that economy is the touchstone of bankruptcy administration but it is difficult to perceive any convincing reason why attorneys should be expected to be content with less compensation for genuine legal services, competently performed, because they are rendered in a bankruptcy case, than would be generally agreed is reasonable for the same or similar services outside of bankruptcy.*” 39 *Referees Journal* 34, April, 1965. (Emphasis supplied).

While there is no unanimity as to the precise meaning of the so-called “economical spirit of the Act”, or of its intended effect, both the commentators and the recent decisions are in favor of curtailing rather than broadening its application.

As is said by *Remington*:

“It is easy to overdo the principle of ‘economy of administration’ by cutting down well-earned attorney’s fees below what is adequate to procure talented service, thus discouraging careful investigation and able preparation and limiting bankruptcy practice to inferior attorneys. Frauds, concealments, falsehoods, and preferences are accomplished in such devious and complicated ways, and the bad bankrupt and his accomplices are so resourceful in their cunning, that ordinary lawsuits elsewhere require correspondingly less preparation and time than does almost any bankrupt estate for its adequate protection. Nothing plays more insidiously into the hands of bankruptcy schemers than propagation of the motion that the ruling test for bankruptcy litigation should be ‘Will it pay?’ Right bankruptcy litigation, like other right litigation, is a fight, not a bargain, a fight for the vindication of pure business morals, with all that that implies for the ultimate betterment of the credit world—and there can be no monetary valuation fixed upon any one contest. None of them ‘pay’, obviously, where the trustee is slothful or under improper influence and the individual creditor has to carry on the fight at his own expense; but the way to make bankruptcy litigation ‘pay’ is to choose vigorous trustees and support them and their attorneys in the struggle

to make bankruptcy administration pure at whatever cost may be necessary." 6 *Remington on Bankruptcy*, 5th Ed., Section 2682, pp. 228-229. (Emphasis supplied).

Collier is to the same effect, to-wit:

"Economy is the most important principle, as has been repeatedly stressed by the United States Supreme Court. As any other category of administrative expenses, fees for an officer's attorney are governed by 'the economical spirit of the Bankruptcy Act.' However, 'economical' is by no means synonymous with 'parsimonious' and should not exclude a compensation that is under all the circumstances of the case fair and reasonable. To reserve as much as possible for distribution to the creditors is one postulate, but there is another, perfectly compatible with the former, not to discourage needlessly able and competent lawyers from accepting a retainer in bankruptcy by denying them reasonable remuneration. A misunderstood economy in this respect may lead to evils far greater than the sacrifice imposed on the individual creditor by reason of an equitable allowance for meritorious and diligent counsel." 3 *Collier on Bankruptcy*, 14th Ed., Sec. 62.12[5], pp. 1488-1489. (Emphasis supplied).

The recent cases readily accept this reasoning:

"That spirit must be respected, but should not be stressed to the extent of driving the abler members of the bar out of the field, where their services may often be of great value to general creditors, as in this case." *In re Belfort Corp.*, 136 F.Supp. 1, 4-5 (D.C. Mo. 1955).

More recently a reviewing District Court said:

“As a final thought, we would like to mention the fact that it is important to the creditors, the Trustee, the bankrupt, the Referee, and the public in general, that competent attorneys be attracted to do the work of attorney for the Trustee in Bankruptcy. While the fees which are awarded to these men must be liberally sprinkled with the economical spirit of the Bankruptcy Act and the parallel idea that attorneys can't expect the same type of compensation as might be charged to a private client, the fact still remains that competent attorneys deserve to be compensated in a fashion which would justify their bringing this wealth of experience and knowledge to the Bankruptcy Court. *The Courts must recognize that these men must be adequately and fairly compensated if they are to be expected to lend their skill and talent to this area of the law.*” *In re Seed Marketing Association* (1964), *supra*, page 813. (Emphasis supplied).

While everyone agrees that economy in the administration of bankruptcy cases is a highly desirable concept and that it should be encouraged, yet, as all authorities warn, the doctrine should not be over-emphasized to such an extent as to deprive the bankruptcy practitioner of a fair and reasonable compensation. As the Court said in *In re Owl Drug Co.*, *supra*:

“‘The workman is worthy of his meat.’ Matthew X:10. Skilled attorneys are entitled to the fair value of their services.”

* * * * *

“‘... For exacting labor done, weighty responsibilities assumed, and great results accomplished, we would deal out compensation with liberal hand.’”

Also, the old adage, “You have to spend money to make money” is said to apply to bankruptcy proceedings as well. 39 *Referees Journal*, supra.

The Referee, in setting appellant's fee, admittedly used the criterion that an attorney for a bankruptcy trustee should *always* be compensated “*appreciably less than he could command for similar services in purely private employment.*”¹⁶ He predicates this legal conclusion upon three Chapter X cases¹⁷ which, upon close analysis, do not support such conclusion. *In re Standard Gas & Electric Co.* (1939), 3 Cir., 106 F.2d 215, 216-217; *In re Mt. Forest Fur Farms of America* (1946), 6 Cir., 157 F.2d 640, 647; and *Finn v. Childs Co.* (1950), 2 Cir., 181 F.2d 431, 435-436.¹⁸ A reading of these cases will show that they simply state the proposition that attorneys in reorganization proceed-

¹⁶Referee's Conclusion of Law No. III (Emphasis supplied), Appendix, p. vii.

¹⁷T.P. 53-56.

¹⁸“... But in a reorganization proceeding, where the lawyers look for compensation to the debtor's estate which may belong, in equity, largely to others than those who have requested their services, they should have in mind the fact that the total aggregate of fees must bear some reasonable relation to the estate's value. Under these circumstances they cannot always expect to be compensated at the same rate as in litigation of the usual kind. *In re Standard Gas & Electric Co.*, 3 Cir., 106 F.2d 215, 216-217; *In re Mt. Forest Fur Farms of America*, 6 Cir., 157 F.2d 640, 647; *London v. Snyder*, 8 Cir., 163 F.2d 621.” (Emphasis supplied.)

ings *cannot always expect* to be compensated in the same manner as if they had rendered their services under purely private employment. This, of course, is markedly different from the criterion used by the Referee, i.e., that the compensation should *always be appreciably less*.

Moreover, the rule espoused by these three decisions has no application to the case at bar because: (1) Appellant does not seek the same compensation that he would command under private employment; and (2) he is, in fact, the legal representative of *all creditors*—not only of certain factions, as is usually the case in reorganization proceedings—having been selected as such, with the approval of the Bankruptcy Court, by a bankruptcy trustee who was nominated and elected by *all the creditors of this estate*.

There are, of course, other distinguishing factors between Chapter X cases and ordinary liquidating cases. In the former, usually substantial asset cases, which assets are voluntarily surrendered to the trustee in an orderly fashion, an attorney's fee is not necessarily dependent upon his bringing additional assets into the estate; while in the latter, where assets are usually scarce, or have been concealed or preferentially transferred—as was done in this case—his fee, if any, is dependent in main upon the extent by which the assets of the estate have been enhanced as the result of his efforts. In brief, the fee of an attorney in Chapter X cases is not totally dependent on his success, while in a liquidating case it is admittedly inherently contingent. Cf. *In re Barceloux*, *supra*.

Also, the ever-present danger that the allowance of fees of the many attorneys who invariably are involved in a Chapter X case, i.e., attorneys for the stockholders' committee, attorneys for the bondholders' committee, attorneys for the debtor corporation, attorneys for the trustee, et al., in their aggregate amount may ruin or endanger the success of the reorganization plan is nonexistent in this or in any other liquidating case.

And last but not least, the Referee's basic premise that the attorney for the trustee in a liquidating bankruptcy represents the bankrupt, and hence a pauper, is unquestionably erroneous (T.P. 61). As Referee William J. Rudin of the Eastern District of New York points out in Footnote No. 2 to his article found in *XXXIV Fordham Law Review* 387 (1966):

"2. Charles Elihu Nadler, a noted authority on bankruptcy administration, has argued that it should not be the attorneys who feel the bite of the spirit of economy. He noted that the rationale behind this spirit of economy is that, if less is paid to the attorneys, more will be available for distribution to creditors. However, it was pointed out that what the courts fail to realize is that it is not the attorneys who are responsible for the poor financial condition of the bankrupt or debtor. If anyone at all is at fault, then that blame must fall upon the creditors (whose careless or negligent extensions of credit created the difficulty), and, therefore, they should rightfully bear the brunt of the costs in the administration. Finally, Nadler predicated that, if the courts persist in their parsimonious attitude, then the cap-

able and respected attorneys will be forced to abandon bankruptcy practice altogether. Nadler, *Fallacies in Judicial Attitudes Towards Legal Fees in Bankruptcy*, 58 Com. L.J. 305, 307-08 (1953)."

II. ABSTRACT STATISTICS CANNOT SUPPLANT JUDICIAL DISCRETION IN DETERMINING WHAT IS A FAIR AND REASONABLE FEE UNDER THE CIRCUMSTANCES OF A PARTICULAR CASE.

The Referee attributed much weight to certain national averages, with which appellant is not familiar, for they are not part of this record.¹⁹ Assuming the accuracy of these averages, they are simply averages, and consequently cannot and ought not control the ultimate decision herein. There are, indeed, many \$60,000.00 cases which can be administered for much less than the national average recited by the Referee, and there are, on the other hand, many cases which cannot be effectively administered at that rate. This is precisely why all knowledgeable authorities stress the fact that each award should be governed by the particular circumstances of the individual case. See, 3 *Collier on Bankruptcy*, Section 62.12[5].

Statistics of course play an important part in our modern way of life. They are not, however, to be used arbitrarily and indiscriminately, and there are instances when they serve little, if any, useful purpose. This is one of those instances, for the reasons so eloquently stated in the previously mentioned Editorial

¹⁹Referee's Finding of Fact No. 7, Appendix, p. vi.

of the National Association of Referees entitled "Bankruptcy Statistics and the Costs of Administration", to-wit:

"More importantly, the statistics do not show *how* the assets came into the estate. In some cases the trustee may find a bird nest on the ground by way of deposits in the bank or easily collectible accounts receivable. Collection of these assets should result in little or no expense.

"On the other hand in order to bring in money or property improperly distributed on the eve of bankruptcy the trustee and his attorneys may have to mine the hard rock, employing accountants and spending days in time consuming Section 21a hearings to get the facts and then prosecuting to a conclusion plenary suits or summary proceedings. All this adds to the expense and raises the percentage costs of administration but is fully justified if it vindicates the Bankruptcy Act and brings assets into the estate." 39 *Referees Journal* 34, April, 1965. (Emphasis supplied).

While no useful purpose would be served by an exhaustive list or analysis of previous decisions on this subject, a few, however, should be briefly alluded to so as to show that the fee requested herein, \$11,400.00 out of an estate of \$61,269.15, is modest indeed in contrast to those which have been previously allowed and approved.

A fee of \$23,000.00 was awarded to the attorney for the trustee in an estate of \$71,200.00, in *In re Belfort* (1955) *supra*.

More recently, in 1964, in *In re Seed Marketing Association*, *supra*, a parallel to the case at bar,

a handsome fee of \$18,500.00 (29% of the assets) as allowed by the Referee, was increased by the reviewing District Court to \$25,731.00 (40% of the assets) in an estate of \$64,204.00.

Other cases worthy of brief mention are, to-wit:

An allowance of \$9,750.00 by the Referee in an estate of \$31,021.00, over the objection of the unsecured creditors, was affirmed on review and on appeal in *Kimm v. Brecke* (1942), 8 Cir., 130 F.2d 687.

A fee of \$7,500.00 for a recovery of \$21,500.00 was approved by the U. S. Supreme Court in *Watkins v. Sedberry* (1923), 261 U.S. 571, 43 S. Ct. 411, 414, 67 L.Ed. 802.

An allowance by the Referee of \$5,000.00 for a recovery of \$8,700 was approved in *Levin v. Barker* (1941), 8 Cir., 122 F.2d 969, Cert. den.

An allowance of \$7,500.00 was granted to the trustee's attorney for obtaining the rejection of \$65,000.00 of general unsecured claims and the conversion of \$13,000.00 of preferred claims to unsecured claims in *In re Independent Distillers of Kentucky* (1940), 34 F.Supp. 708 (D.C. Ky.).

An allowance of \$6,750.00 was held not excessive for the recovery of \$18,000.00 in *Hammer v. Tuffy* (1944), 2 Cir., 145 F.2d 447.

An interim allowance of \$25,000.00, based upon a recovery of \$125,000.00, was upheld by this Court, over the objections of a creditor, in *In re Barceloux*, *supra*.

An allowance of \$55,000.00 was increased to \$90,000.00, over the objections of some creditors, in *In re Owl Drug Co.*, *supra*, although the attorneys brought absolutely nothing into the estate.

A rate of \$25.00 per hour, as used by the Referee, was held to be fair and reasonable 14 years ago, over the objections of a creditor, in *In re Lustrom Corp.* (1952), 7 Cir., 196 F.2d 975.

According to a footnote in *In re Dole Company* (1965), 244 F.Supp. 751, 757 (D.C. Maine), Judge Wyzanski of the United States District Court for the District of Massachusetts recently said, in an unreported opinion, to-wit:

“Recent litigation in this Court indicates that a senior lawyer of marked ability and specialized experience in bankruptcy doing the regular work of his calling may reasonably charge in the range of \$30 to \$40 per hour.”

A case that is particularly in point and which warrants special attention is *In re Seed Marketing Association* (1964), *supra*. It re-affirms the three propositions which go to the heart of this appeal:

(1) It stands for the proposition that the recommended minimum fee schedule of the bar association of the particular locality should be considered in the determination of an appropriate fee. (It is interesting to note that in that case, the Referee's initial allowance, which was increased by the reviewing Court, was based upon a rate well in excess of the recommended minimum fee.²⁰ There are other cases to the same effect. *In re Dole Company* (1965), *supra*.)

²⁰In the case at bar, the award of the Referee averages out to an hourly rate of \$19.00, of which \$9.00, according to the testimony of appellant, is directly attributable to his overhead. (T.P. 51.) The minimum hourly rate prescribed by the Maricopa County Bar Association is \$30.00. Referee's Finding of Fact No. 6, Appendix, p. vi.

(2) It stands for the proposition that a reviewing Court will, under appropriate circumstances, increase the award of a Referee. (This is, of course, not unique to that case alone. Cf. *In re Osofsky* (1931), 50 F.2d 925 (D.C. N.Y.), which was cited with approval by this Court first in *In re Barceloux*, supra, and more recently in *Sampsell v. Monell*, supra. Cf. also, *Monaghan v. Hill* (1944), 9 Cir., 140 F.2d 31, a non-bankruptcy case, where an award of \$12,500.00 was ordered by this Court to be increased to not less than \$50,000.00.)

(3) It stands for the proposition that the economy doctrine is not punitive in nature and, its limitations notwithstanding, that bankruptcy practitioners "must be adequately and fairly compensated if they are to be expected to lend their skill and talent to this area of the law."

One of the more prolific and respected writers on this subject, Referee Herzog, suggests this formula, as a rule of thumb, in cases such as the one at bar where substantial assets are brought into an estate by virtue of the efforts of the attorney for the trustee, to-wit:

"... approximately 30% of a modest recovery and approximately 20% of a larger recovery—to be varied by time necessarily consumed, intricacy of the problem, opposition encountered and skill required and applied—this added to reasonable compensation for the professional services rendered other than in connection with recoveries." *In re Seed Marketing Association*, supra, p. 821.

Even under this formula, the \$7,500.00 award of the Referee is grossly unfair and inadequate, in that 30%

of the \$30,500.00 actual cash which was brought into the estate as the direct result of appellant's efforts would in itself warrant a fee in excess of \$9,000.00. If one were to add to this amount the reasonable value of the services rendered by appellant in regard to the obtaining of the waiver and/or withdrawal of valid claims aggregating in excess of \$75,000.00—thereby enhancing the available dividend distributions to the remaining creditors by approximately \$15,000.00—and the reasonable value of his routine services rendered to the trustee, then the total would be much more than the requested fee.

Before concluding, brief mention should be made of *Official Creditors' Committee of Fox Markets, Inc. v. Ely* (1964), 9 Cir., 337 F.2d 461. There, it will be recalled, after an exhaustive review of the authorities, this Court concluded that the fee of the attorneys for the trustee should be reduced to the equivalent of \$74.00 per hour. In contrast, the fee requested herein by appellant is merely \$30.00 per hour.

CONCLUSION

Based upon the foregoing principles, criteria, and authorities, it is respectfully submitted that the award of appellant be increased to the amount prayed for.

Dated, Phoenix, Arizona,
March 10, 1967.

Respectfully submitted,
FENNEMORE, CRAIG, ALLEN & McCLENNEN,
By DANIEL T. BERGIN,
Attorneys for Appellant.

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DANIEL T. BERGIN.

(Appendix Follows)

Appendix

Appendix

In the United States District Court
for the District of Arizona

In Bankruptcy No. B-6701-Phx.

In the Matter of Double Seven Corporation, Bankrupt.	}
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SEPARATE FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER ON PETITIONS FOR ATTORNEY'S FEES

At Phoenix, in said District, this 17th day of September, 1965.

This matter having come before the Court for hearing on September 10, 1965, at the regularly noticed final meeting of creditors, on the Petitions of Henry Jacobowitz for allowance of attorney's fees for services rendered by him, first to the receiver and then to the trustee of this estate,

Now upon the said Petitions of Henry Jacobowitz and upon all the proceedings had before me at said hearing, the Court does hereby find the facts and states separately its conclusions of law thereon and directs the entry of judgment as follows:

Findings of Fact

1. That all the allegations in the Petitions of Henry Jacobowitz pertaining to the allowance of his attorney's fees are true as stated, including, among other things, that he has successfully prosecuted in behalf of the estate, four plenary actions, which enhanced the assets of this estate by cash in the sum of \$30,500.00, and by an additional sum of \$15,000.00 or so, by reason of obtaining the withdrawal and the waiver of certain creditors' claims aggregating in excess of \$75,000.00.

2. That the total fee of \$11,410.00 as prayed for by petitioner is a reasonable sum for the services rendered by him, based upon the value of such services in this community when rendered in ordinary civil proceedings.

3. That a different standard applies in bankruptcy proceedings.

Conclusions of Law

Based upon the foregoing findings, the Court sets the fee of petitioner at \$7,500.00.

Now, Therefore, It Is Ordered that the said petitioner be, and he hereby is, allowed the sum of \$7,500.00, plus his expenses, and the said sum together with his expenses, less advances, is hereby ordered to be paid.

/s/ Hugh M. Caldwell
Referee in Bankruptcy

In the United States District Court
for the District of Arizona

October Session

At Phoenix

Honorable Walter E. Craig, United States District
Judge, Presiding

B-6701—Phx.

In the Matter of Double Seven Corporation, Bankrupt.
--

MINUTE ENTRY

of November 8, 1965

(Phoenix Division)

Petition of Henry Jacobowitz for Review of Referee's Order is called for hearing.

The Trustee, Tom Roof and the Petitioner Henry Jacobowitz are present. Said Petition for review is argued by Mr. Jacobowitz.

It Is Ordered that the Referee's Order of September 17, 1965, is set aside with respect to attorneys fees in this matter and that the attorney for the trustee herein be paid the sum of \$11,410.00 as prayed for, counsel to prepare formal order.

In the United States District Court
for the District of Arizona

B-6701—Phx.

In the Matter of Double Seven Corporation Bankrupt.

SUPPLEMENTARY FINDINGS OF FACT, CON-
CLUSIONS OF LAW AND ORDER ON
PETITION FOR ATTORNEY'S FEE

At Tucson, in said District, on the 29 day of June,
1966.

This matter having been remanded to this Court by the Hon. Carl A. Muecke, Judge of the United States District Court, for further testimony and for amplification of the original Findings of Fact, and a special hearing having been held on this matter on January 14, 1966, at which time extensive testimony was adduced, now the Court does hereby find, once again, the facts and states separately its conclusions of law thereon and directs the entry of judgment as follows:

FINDINGS OF FACT

1. That all the allegations of the petitioner, Henry Jacobowitz, as contained in his two petitions pertaining to the allowance of his attorney's fees, are true as stated, including, among other things:

(a) That over a period of more than three years he expended approximately three hundred forty-two (342) hours, plus four (4) full days of trial time before the United States District Court, in plenary proceedings, in performing legal services for the estate;

(b) That he successfully prosecuted, in behalf of the estate, four plenary actions, one of which was tried to a jury, as a result of which he enhanced the assets of this estate by cash in the sum of \$30,500.00;

(c) That the defendants in the plenary proceedings were ably represented by prominent members of the local Bar and that the recoveries were difficult, not only because they involved intricate questions of law, but because the records of the bankrupt were inadequate and in many instances completely wanting and the trustee, as is often the case in proceedings of this nature, had to rely, in main, on the testimony of the bankrupt whose interests were contrary to those of the trustee, and upon the testimony of the defendants on cross-examination;

(d) That he obtained the withdrawal and waiver of certain creditors' claims aggregating in excess of \$75,000.00 thereby increasing the amount to be distributed pro rata among the remaining creditors by approximately \$15,000.00.

2. The petitioner exhibited great skill in meeting the intricate and difficult legal propositions encountered.

3. The trustee herein, himself an attorney, testified that the fee prayed for by the petitioner is reasonable.

4. The Creditors' Committee recommends the allowance of the fee as prayed for.¹

5. The collective expert testimony of the attorneys who testified herein, all experienced and knowledgeable in this field, is to the effect that the fee as prayed for is reasonable and, in fact, on the low side.²

6. The minimum fee recommended by the Maricopa County Bar Association for work of this nature is \$30.00 per hour, plus \$250.00 per day in Court and the fee requested by applicant is predicated upon these rates.

7. The total recovery herein amounts to \$61,269.15; total fees and other administrative expenses as requested amount to \$23,602.36, or 38.5% of the recovery; the total fees and other expenses allowed, including petitioner's fee in the amount of \$7,500.00, total

¹In this regard, the Chairman of the Creditors' Committee, Ted F. Warner, an attorney and who himself represents almost 80% of the creditors of this estate, testified that the fee as prayed for is most reasonable, and that it is consistent with the minimum fee schedule as prescribed by the Maricopa County Bar Association. He also recommends that the fee be allowed (See Transcript of Proceedings of January 14, 1966, pp. 1-17)

²In this regard, Mr. Henderson Stockton, a practitioner of more than 53 years, with a great deal of experience in this field, after likening the recoveries herein to that of "going down into the bottom of the ocean and finding an old sunken ship and bringing out the gold that's stored there," testified upon personal knowledge of the facts and the questions of law that existed in these proceedings that a minimum fee of \$15,000.00 would be reasonable (T.P. 32); Mr. Allan K. Perry, also a practitioner of many, many years, 46 years, with extensive experience in this field, testified that a reasonable fee would be \$15,000.00 (T.P. 25). Mr. William H. Gooding, now a Judge of the Maricopa County Superior Court, testified that a reasonable fee would be between \$13,000.00 and \$15,000.00 (T.P. 20). Mr. Daniel T. Bergin, a partner in the law firm of Fennemore, Craig, Allen & McClellenn, testified that a reasonable fee would be \$13,000.00.

\$16,789.98, or 27.4% of the recovery. Cases of this size closed throughout the United States during the fiscal year 1965 were administered for a cost averaging 19.9% of the recovery, according to figures recently released by the Administrative Office of the United States Courts; costs for previous years range from 18.4% to 20.7%.

CONCLUSIONS OF LAW

I.

The total fee of \$11,410.00 asked by petitioner would be a reasonable sum for like services rendered by an attorney in private employment according to schedules of fees as recommended by the Maricopa County Bar Association.

II.

The amount of compensation allowable in bankruptcy proceedings is not measured by the amount which counsel would have received for the same services in private employment.

III.

The "economical spirit of the Bankruptcy Act" demands that an attorney be paid in bankruptcy matters an amount appreciably less than he could command for similar services in purely private employment.

Now, therefore, after again considering the matter and taking into account the size of this estate and the proportionate amount thereof recovered through the efforts of petitioner, the time expended by him in

dealing with the matters involved, his ability and experience, the difficulty and intricacy of the legal propositions determined, the skill employed by petitioner, the opposition met, the opinions evidenced touching the reasonableness of the fee requested, all in the light of the limitation of the "economical spirit of the Bankruptcy Act" and the total costs incurred in the administration of the estate as related to the size thereof,

IT IS ORDERED that the previous allowance of \$7,500.00 to the petitioner, plus expenses, remain in full force and effect.

Hugh M. Caldwell,
Referee in Bankruptcy.

In the United States District Court
for the District of Arizona

B-6701—Phoenix

In the Matter of Double Seven Corporation, Bankrupt.	}
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ORDER

The petition for review of the Order of the Referee in Bankruptcy, dated June 29, 1966, having been argued and submitted, and the Court having duly considered the same,

It Is Hereby Ordered that the Order of the Referee in Bankruptcy dated June 29, 1966 is affirmed with the following modifications:

1. The first paragraph of Page 4 shall be amended to read:

"The amount of compensation allowable in bankruptcy proceedings is not measured by the amount which counsel would have received for the same services in private employment but can be and frequently is less. The amount of compensation ordered by the Court depends on the circumstances of each case."

2. The second paragraph on Page 4 shall be deleted entirely.

Accordingly, the Order of the Referee in Bankruptcy under Review is affirmed with modifications.

Dated this 23rd day of August, 1966 at Phoenix, Arizona.

C. A. Muecke

United States District Judge

Copies of the foregoing
mailed this 23rd day of
August, 1966 to:

Hugh M. Caldwell, Referee in Bankruptcy
Henry Jacobowitz, Attorney for Trustee

N O. 2 1 3 6 8

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TRAVIS TRUMAN LOTT, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

WM. MATTHEW BYRNE, JR.,
United States Attorney,
ROBERT L. BROGIO,
Assistant U. S. Attorney,
Chief, Criminal Division,
WILLIAM J. GARGARO, JR.,
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FILED

SEP 18 1967

WM. B. LUCK, CLERK

Attorneys for Appellee,
United States of America.

N O. 2 1 3 6 8

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TRAVIS TRUMAN LOTT, JR.,

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United States of America.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TRAVIS TRUMAN LOTT, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

JURISDICTION AND
STATEMENT OF THE CASE

The appellant, Travis Truman Lott, Jr., was indicted on February 9, 1966, by the Federal Grand Jury for the Southern District of California, Central Division. ^{1/}

This indictment charges appellant Lott, together with one Raymond Beckles, with the robbery of Culver Federal Savings and Loan Association on January 26, 1966, and the placing of lives in jeopardy in committing the offense by the use of a .38 caliber

^{1/} C. T. 2; "C. T." refers to Clerk's Transcript of Proceedings.

revolver [C. T. 2].

The appellant was arraigned on February 23, 1966, and the Court ordered a plea of not guilty entered when the defendant refused to enter plea [C. T. 10].

Trial by jury commenced as to appellant on April 5, 1966, before the Honorable Irving Hill, United States District Judge [C. T. 18], the co-defendant Beckles having changed his plea to guilty prior to trial [C. T. 14]. On April 12, 1966, the jury returned a verdict of guilty as charged in the indictment [C. T. 35-36].

On May 2, 1966, the appellant was sentenced to imprisonment for a period of 20 years [C. T. 48-49].

Appellant filed notice of appeal on May 6, 1966 [C. T. 52, 65].

The jurisdiction of the District Court is predicated on Title 18, United States Code, Sections 2113(a) and (d), and Sections 3231 and 3237.

This Court has jurisdiction under Sections 1291 and 1294, Title 28 of the United States Code.

STATUTE INVOLVED

Title 18, United States Code, Section 2113(a) and (d) provides in pertinent part:

"(a) Whoever by force and violence or by intimidation, takes, or attempts to take, from the

person or presence of another any property or any other thing of value belonging to, or in the care, custody, control, management or possession of any bank or any savings and loan association. . . .

"(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (d) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than \$10,000 or imprisoned not more than 25 years, or both. "

STATEMENT OF FACTS

On January 26, 1966, at approximately 3:30 P.M. two men entered the Culver City Federal Savings and Loan Association, which was an insured institution as defined in 18 U.S.C. §2113(g) [R. T. pp. 174-177]. ^{2/} They asked Mrs. Lelia Blake, who was secretary to the president, in the presence of C. William Jackson, who was vice-president and controller of the bank, if they could see a loan officer [R. T. 178, 194]. Mrs. Blake excused herself to find the loan officer, and Mr. Jackson went back to his work [R. T. 178, 195]. The telephone rang, and Mrs. Blake answered it - the next thing she knew, one of the two men was standing in front

^{2/} "R. T." refers to Reporter's Transcript of Proceedings.

of her desk saying, "Get off the phone" [R. T. 195]. Mr. Jackson, looked to his left and saw one of the two men who had asked to see a loan officer standing with a briefcase in one hand, and a revolver in the other. That man was the defendant Travis Truman Lott, Jr., appellant here [R. T. 178].

Mr. Donald Boss, the loan service officer at the bank, had come from the vault room and was talking to the girl who does their bookkeeping, when he suddenly felt something jabbed in his back. He turned around and saw the defendant Lott standing with a revolver [R. T. 215-216].

The people in the bank were all "herded" into a kitchen area in the back of the building, where they were instructed by the defendant Lott to lie on the floor [R. T. 184-185; 195-197].

Co-defendant Beckles, who had come in with the defendant, stated, "I need a key". Whereupon the defendant said, "Allright. Somebody better come up with the key, or someone is going to get hurt." [R. T. 185].

Mr. Jackson, who held one key under the bank's dual cash system, unlocked the safe for the defendants, and inserted his key into the cash compartment. He was then pushed into a corner by Beckles, who examined the safe and then said, "Let's go get the other key" [R. T. 185]. He brought Mr. Jackson back to the kitchen, where Jackson took his place on the floor again, and Mr. Golinsky, the bank's assistant controller, went back to the vault with the co-defendant, and swung open the door to the cash compartment [R. T. 185-186; 208].

Mr. Golinsky watched the co-defendant remove the cash box and place it into a brief case, whereupon Mr. Golinsky was led by the coat back into the kitchen, where he sat down, as instructed, and bowed his head [R. T. 207-209].

The defendant Lott crossed the kitchen area, and then turned and said, "Nobody move for five minutes" [R. T. 186, 209]. The robbers disappeared, and the people lying on the kitchen floor heard the door leading outside slam [R. T. 186].

Then Mr. Golinsky stood up on a chair and through the window observed what he believed to be the getaway car take off at a fast rate of speed, traveling south on Midway Avenue in Culver City [R. T. 209-210]. The automobile was a 1964 green Chevrolet station wagon, which had been parked just outside the building [R. T. 212].

Police Officer William Hebrard was in his patrol car when he received an all-units broadcast describing the bank robbers as "two male negroes, dark suit, light suit, mustache, dark glasses, driving a '64 green Chevrolet Station Wagon". Hearing that they had departed going south on Midway, Officer Hebrard placed his patrol car in the driveway of MGM Studios' parking lot, which was about one mile south of the bank on Overland Boulevard [R. T. 219-221].

Shortly thereafter, he observed a green '64 Chevrolet station wagon carrying two male negroes, one wearing a dark suit and the other a light one, one having a mustache and dark glasses [R. T. 221]. Officer Hebrard pulled alongside the automobile and

motioned toward the curb. The defendant Lott, who was driving, nodded that he understood the officer's request, pulled around the corner slowly, and then took off at a high rate of speed [R. T. 221-222].

The police officer assumed pursuit in a chase that involving zigzagging "from clear across the road, one lane to the other, and coming back in whenever they could find an opening" [R. T. 223]. Officer Hebrard had his red light and siren on, and when the defendant failed to stop, the policeman began firing. He fired five shots [R. T. 223].

His last shot, together with the high speed and the zizzagging, caused the fleeing auto to spin out, and the defendants crashed into a parked car. The officer backed in and rammed the vehicle from the front, pinning in the defendant's automobile [R. T. 223].

The robbers got out on the passenger side, and split up, one ran east and the other, the defendant Lott, went west [R. T. 223]. Officer Hebrard unsuccessfully yelled for them to stop and fired more shots, but had to remain with the automobile - for he assumed that the bank money was still in the car when the defendants ran without carrying anything in their hands [R. T. 224].

In the back seat of that vehicle, Officer Hebrard found a briefcase, and in it a cash box containing \$5,163.31 [R. T. 224-226, 259], the same amount of money which had been plundered from the bank [R. T. 187-188]. Also found in the car was a business card bearing the words, "Travis Lott, Collector, Assessor" [R. T. 257-259] and between the door and the seat on the drivers side of the

floorboard a loaded gun was discovered [R. T. 234-235], which bore the fingerprints of the defendant Lott [R. T. 266-272], and which appeared to be the one used in the robbery [R. T. 182, 195-196, 205-206, 216-217].

Another police officer, Harry Hartinian, while on patrol received a description regarding the flight of the suspects, and heard that one was west bound on Berryman and Sepulveda, wearing a dark suit, dark glasses, a mustache, and was running between houses and jumping fences [R. T. 244-245]. Hartinian proceeded to Culver Park Drive and Berryman, west bound, where, at approximately 3:40 P. M., he observed and arrested the defendant Lott, who was wearing a dark suit, dark glasses and had a mustache. The defendant had perspiration on his forehead and his breathing was not normal. His clothes bore the debris and residue of redwood paint, and had grass stains. This apprehension was located about four blocks from the spot where Officer Hebrard rammed the bank robbers' vehicle [R. T. 245-247].

At the trial, defendant Lott chose to take the stand. He told the following story: On the morning of the robbery he received a telephone call from Raymond Beckles, the co-defendant in the case [R. T. 289]. They decided to go to the race track that day, as they were "hoping to strike it rich" [R. T. 290]. Together with another friend, they got into Lott's Chevrolet station wagon and went to Santa Anita, which is about 34 miles from Culver City, where they remained until about 2:30 P. M. [R. T. 291]. Beckles and the friend left defendant Lott off at his sister's home in Venice, California,

at about 3:00 P.M. Lott told them to return promptly with his car as he had to be home by 4:00 [R. T. 291-292]. Lott said that his sister was not home, but he decided to wait, as she usually gets home about 3:30 [R. T. 292]. After waiting for fifteen minutes or half an hour, Lott decided to "just walk up to Culver City and see where they were and what they were doing" [R. T. 293-294]. Whereupon, he was arrested [R. T. 295].

Lott stated at the trial that he had handled the gun that day in the car on the way to the race track. Beckles, according to Lott, was sitting in the back seat behind Lott, who was driving. Lott had his right hand on the steering wheel and, when Beckles said, "Look at this", Lott reached back with his left and took the gun, examined it, and then handed it back to Beckles, saying, "Here man, take this. I don't want nothing to do with this. I can't be messing around with a gun." [R. T. 295-297].

Lott explained that the reason he had taken his tie off when found by the police on the day of his arrest, January 26, 1966, was "because it was really hot that day. In fact, I think it was around 97 degrees." [R. T. 301].

He explained the paint and grass stains, saying, "I might have picked up some debris, you know, that was laying on the grass on this lady's front lawn" [R. T. 302], and his perspiration was due, he said, to the fact that he'd been walking for ten or fifteen minutes and it was so hot [R. T. 302].

On cross-examination, Lott was asked whether he hadn't previously told an FBI agent that he had parked the car himself in

front of the bank, left the car's motor running, with his wallet and keys in the automobile, and that someone then stole his car, and when arrested he was wandering around trying to find the police so that he could report the theft of his vehicle [R. T. 311]. He was asked if he hadn't also told the FBI that the gun was his and that he had "bought it from a person in East Los Angeles through a female friend of Ray's" [R. T. 312]. He denied making these prior statements [R. T. 311-313]. He did, however, admit that he had a prior robbery conviction, for which he served six years and eight months in prison [R. T. 321].

Agent Carl Schlatter, who had been employed by the Federal Bureau of Investigation for over 19 years, was called as a rebuttal witness and testified to the existence of the prior statements which the defendant had denied making [R. T. 324, 327-331]. Agent Schlatter stated that he had interviewed the defendant Lott in the presence of another agent, immediately after the defendant was arraigned by the commissioner [R. T. 325-326]. The commissioner, who had initiated the question of counsel, delayed the hearing until later in the day so that the defendant could obtain a private lawyer [R. T. 336, 346, 350-351].

Although the defendant testified that he had requested and desired an attorney during the interrogation by Agent Schlatter, who had failed to advise him of the right to counsel, Agent Schlatter testified he had informed the defendant that he could have an attorney appointed for him by the court, and that before saying anything to the agents he could contact and discuss with a lawyer,

or anyone else he chose [R. T. 326]. He also advised Lott of his right to remain silent, and told him that anything he did say could be used against him in a court of law [R. T. 326]. Regarding the defendant's testimony that Agent Schlatter had told him his statements would be "off the record" [R. T. 335-338], and that he had repeatedly requested an attorney's presence, Agent Schlatter testified as follows:

DIRECT EXAMINATION

"Q. BY MR. BALABAN: Mr. Schlatter, calling your attention again to January 27th of 1966, and to the conversation about which you have previously testified, at any time during that conversation with the defendant did the defendant ask to speak to an attorney?

"A. No, he did not.

"Q. Did he ever tell you that he didn't want to talk to you until he had spoken to an attorney?

"A. No, he did not.

"Q. Had you told him he could speak to an attorney and you would wait until he consulted with an attorney if he cared to do so?

"A. Yes. I had told him that he didn't have to talk until he had seen an attorney. And he said he was well aware of his rights. That he would -- it would not be necessary for him to talk to an

attorney before talking to us.

"MR. BALABAN: Nothing further.

"THE COURT: Mr. Schlatter, was there anything said in your conversation with the defendant that you told us about his statements made to you being off the record?

"THE WITNESS: No, sir. I told him, your Honor, that anything he said to us could be used against him in a court of law and, therefore, couldn't be possibly off the record." [R. T. pp. 345 and 346].

Following the taking of all offered testimony on the question of voluntariness, the following proceedings took place in open court outside the presence and hearing of the jury:

"THE COURT: First, before we commence discussing instructions, gentlemen -- and let the record show the jury is not present -- although no motion to suppress has been made in this case, and no other motion is pending before me, I want to put on the record my findings as to the admissions testified to by Agent Schlatter at the end of this morning's session.

"I will find that the defendant had been fully and properly advised as to his constitutional rights at all stages prior to the admissions having been

made. And I will further find that there has been no denial of the right to counsel in connection with these admissions as enunciated in Escobedo and the related cases.

"I also find that the admissions were voluntary and not coerced.

"Now, having made those findings, Mr. Bueno, I will give, if you wish, among the instructions Mathes and Devitt Nos. 8.19 and 8.20, which deal with voluntary admissions, and direct the jury to disregard admissions they find to have been involuntary and coerced.

"Would you request such instructions?

"MR. BUENO: Yes, I would, your Honor.

"THE COURT: Then I will pass out a revision of Mathes and Devitt 8.20 on when admissions are involuntary. And let me pass out to you, Mr. Bueno, Mathes and Devitt itself so that you can see No. 8.19, and read it in relationship to this special instruction No. 1 of the court, which I have, as I say, used 8.20 as the model, and revised it.

(Counsel reading).

"THE COURT: Have you had a chance to read those, Mr. Bueno?

"MR. BUENO: Yes, I have.

"THE COURT: Will 8.19 and the court's special No. 1 cover the matter satisfactorily as far

as you are concerned?

"MR. BUENO: Yes, your Honor.

"THE COURT: Do you have anything else to request with respect to the voluntariness and lack of coercion, or coercion as to these admissions?

"MR. BUENO: Nothing else, your Honor."

[R. T. 353-354].

ARGUMENT

I

THERE WAS NO ERROR IN TRIAL COURT'S FINDING THAT APPELLANT HAD NOT BEEN DENIED ANY RIGHTS PRESCRIBED IN ESCOBEDO v. ILLINOIS, WHERE APPELLANT HAD BEEN WARNED OF HIS RIGHTS BY THE U.S. COMMISSIONER AND BY THE FBI, PRIOR TO INTERVIEW, AND HAD TOLD THE AGENT THAT HE FELT A LAWYER'S PRESENCE PRIOR TO INTERVIEW WAS UNNECESSARY.

Preliminarily, it should be noted that Miranda v. Arizona, cited by appellant in his opening brief at page 9, 384 U.S. 436 (1966), has no application to this appeal. Rather, Escobedo v. Illinois, 378 U.S. 478 (1964) would be relevant since appellant's trial took place in April of 1966, which was prior to the date of the Miranda opinion [C. T. 18, 31-36]. Johnson v. New Jersey, 384 U.S. 719 (1966).

Appellant contends that the statements used to impeach his testimony at trial were elicited in violation of his constitutional rights, and that the trial court's specific finding to the contrary

[R. T. 353] was erroneous. This contention is based on the reasoning that because the Commissioner, upon his own initiative [R. T. 348, 350-351] had continued the preliminary hearing so that appellant might obtain an attorney, appellant could not thereafter be interviewed in the absence of an attorney, despite the fact that he was advised of his constitutional rights by the Commissioner [R. T. 337] and warned again by the F.B.I. agent prior to interview [R. T. 326], and, after all this precautioning, appellant stated that he felt the presence of a lawyer was unnecessary [R. T. 345-346] prior to the interview.

In this regard, appellant cites Queen v. United States, 335 F.2d 297 (D.C. Cir., 1964); United States v. Guerra, 334 F.2d 138, 144 (2nd Cir., 1964); Ricks v. United States, 334 F.2d 964, 969-70 (D.C. Cir., 1964); and Johnson v. United States, 344 F.2d 163 (D.C. Cir., 1964). These cases are all factually distinguishable.

In Johnson, the appellants were questioned by police officers without any indication that they were warned of their constitutional rights or waived any such rights.

In Guerra, the questioning took place post-indictment, there was no mention of whether appellant had been warned of his rights, and the record was said to have provided "no indication whatsoever as to the nature, duration, or extent of this interrogation" (Guerra, supra, at pp. 144-145). Even there, the use of the statements introduced in an abortive attempt to impeach the defendant on a minor issue was held not to require reversal.

In Queen, there was no advice as to right to have counsel

present, and nothing to indicate a waiver of counsel. In fact, the interviewing officer in Queen, knew that the defendant had either "obtained a lawyer, was in the process of obtaining one, or was going to do so. He was not sure which of these answers she gave." (Queen, supra, at p. 298)

In Ricks, the court first held that the prisoner had not been taken before a magistrate without unnecessary delay. When he was brought before a magistrate, he was not advised that he could have counsel appointed for him. The preliminary hearing was postponed for the defendant to obtain counsel. He was thereafter taken before a District Judge who told him that he did not have to go with the police and that anything which transpired could be used against him. "The judge did not tell Ricks that he had a right to counsel nor did he offer to appoint counsel" (Ricks, supra, at p. 967). Ricks was then released to the police for a period of four hours, during which he repeated his earlier admissions (held inadmissible under Mallory v. United States, 354 U.S. 449 (1957),) and all of the defendant's statements were admitted into evidence over his objection.

Even assuming that the foregoing Ricks and Queen cases were factually compelling, their reasoning has not been found universally compelling, even to another three-judge panel of their own D. C. Circuit. ^{3/} And the Sixth Circuit, in United States v.

^{3/} c.f. Cephus v. United States, 352 F.2d 663, 665 (D.C. Cir. 1965)

Hensley, 374 F.2d 341 (6th Cir., 1967) wrote, at pp. 350-351:

" ... The first of these claims is that the government agents who interrogated appellants did so after they had retained counsel and without notice to or agreement of said counsel. In this regard appellants rely upon Massiah v. United States (377 U.S. 201, 1964); Ricks v. United States, ... 334 F.2d 964 (C.A.D.C. 1964); Queen v. United States, ... 335 F.2d 297 (C.A.D.C., 1964). We have already noted that appellants herein had not been indicted as of the time of their confessions, whereas Massiah had been. In Ricks and Queen, the Appellate Court for the District of Columbia (on considerably different facts than those in the instant appeals) and with distinctive federal law applicable to the District of Columbia (see 2-2202 D.C. Code) held in effect that the fact that Massiah had been indicted and had retained counsel did not constitute substantial factual distinction between the facts relevant to Massiah's statement and those of Queen and Ricks wherein neither of these things were true. These opinions we read as educated anticipations of the rules laid down subsequently by the Supreme Court in Miranda v. State of Arizona, supra. But we also feel that the Supreme Court's refusal to make the Miranda rule retroactive

indicates that it clearly did not in Massiah contemplate a barring of all in-custody confessions without counsel present or agreeing to interrogation.

"We hold that Massiah v. United States, supra, is distinguishable from our instant appeals on important factual differences. Further, on the authority of Davis v. State of North Carolina, 384 U.S. 737, (1966), we decline to follow the suggested import of Queen and Ricks until after the date of the Miranda decision (June 13, 1966).

"Just as important to our decision is the fact that the record allowed the judge and jury to find from disputed facts as to each appellant either that (1) he had not retained counsel, or (2) that he had freely and voluntarily waived the presence of counsel at interrogation."

Similarly, in the instant Lott appeal, there were sufficient facts for the court and jury to find that the accused had freely and voluntarily waived the presence of counsel at interrogation. The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused. Johnson v. Zerbst 304 U.S. 458, 464 (1938).

Appellant Lott testified that he was a real estate rent and trust deed collector [R. T. 300], had worked as collector for the property manager of the Jefferson Savings & Loan Association [R. T. 300] at an average income of \$200.00 a week [R. T. 321], had formed a maintenance company with his brother which served three banks [R. T. 322], worked with his father's real estate office [R. T. 323], "and various other enterprises" [R. T. 323], and had served over six years in prison [R. T. 320-321]. This defendant was, as Judge Ely described one in Calhoun v. United States, 368 F.2d 59, 61 (9th Cir., 1966), "wary, knowledgeable, and free from coercion (and) was disinterested in legal advice at the time of his interrogation. From the testimony, it (appeared) that (he) was confident of his ability to establish, by persuasion, his own innocence."

It would be a strange situation indeed, if once a Commissioner on his own initiative, postponed a preliminary hearing for a defendant to obtain an attorney, that defendant could never thereafter elect to proceed without one. In United States v. Plata, 361 F.2d 958 (7th Cir., 1966), after being advised of his rights, the defendant stated that he desired to consult the lawyer who had represented him in business, and two unsuccessful attempts were made to reach him by telephone. No request was made that any other lawyer be contacted. There the court said, "We think that the inference is inescapable that defendant, with his knowledge of his right to counsel, voluntarily responded to the agent's inquiry." (p. 961). And even more recently, the same Circuit has held,

in a post-indictment case where an attorney had already been appointed and the defendant was arrested on a bench warrant issued after a failure to appear, that subsequent statements by the accused, made after a full constitutional warning, could be used against him. United States v. Thomas Patrick Smith, #15878, 7th Cir., June 22, 1967; (corrected to: #15878, 7th Cir., September term 1966, April session 1967).

In the instant case, the trial court's finding, outside of the presence of the jury, that "there has been no denial of the right to counsel in connection with these admissions as enunciated in Escobedo and the related cases [R. T. 353]" was clearly correct.

CONCLUSION

An examination of the entire record indicates that appellant received a fair trial and, there being no prejudicial error, the judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ William Gargaro, Jr.

WILLIAM J. GARGARO, JR.

NO. 21367 ✓

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FOR THE NINTH CIRCUIT

FELIPE RIVERA CORONADO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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JUN 7 1967

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IN THE UNITED STATES COURT OF APPEALS
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APPELLEE'S BRIEF

I.

STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING
JURISDICTION

On April 14, 1965, the federal grand jury for the Southern District of California, Southern Division, returned a two-count indictment (34638-SD) charging appellant, Felipe Rivera Coronado and Russell Raymond Reinoehl in Count One with a violation of Title 21, United States Code, Section 176 (a) (illegal importation of marihuana). In Count Two Russell Raymond Reinoehl was charged with a violation of Title 21, United States Code, Section 176(a) (concealment and transportation of illegally imported marihuana) and appellant Felipe Rivera Coronado was charged with a violation of Title 18, United States Code, Section 2 (aiding and abetting the concealment and

transportation by Russell Raymond Reinoehl of illegally imported marihuana).
Clerk's Transcript, pp. 2-3.

The trial of appellant on both counts in the indictment commenced on Tuesday, June 15, 1965, and terminated on June 16, 1965. The case was tried by a jury, and the jury found the appellant guilty of both counts of the indictment. Id. at 7, 26.

On July 9, 1965, the appellant was sentenced by the Honorable Fred Kunzel to a 5-year period of incarceration on each count, to run concurrently. Id. at 35. A timely Notice of Appeal was filed by the appellant. Id. at 40-42.

The offenses occurred in the Southern District of California, and jurisdiction of the District Court was based on Title 21, United States Code, Section 176(a) and Title 18, United States Code, Sections 2, and 3231. The jurisdiction of the United States Court of Appeals for the Ninth Circuit is based on Title 28, United States Code, Section 1291 and 1294.

II.

STATUTES INVOLVED

Title 21, United States Code, Section 176(a) reads in pertinent part as follows:

"Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced,

or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, . . . shall be imprisoned not less than five or more than twenty years, and in addition, may be fined not more than \$20,000"

Title 18, United States Code, Section 2 reads in pertinent part as follows:

"Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal"

III.

STATEMENT OF THE CASE

A. Questions Presented.

1. Was there sufficient evidence of possession by the appellant to sustain the convictions?
2. Was error committed by asking the appellant if he made the statement "Even if I knew anything regarding the marihuana, or if I had smoked marihuana, I wouldn't tell you"?
3. Was prejudicial error committed by the presentation of the rebuttal testimony of Customs Agent John Maxcy, assuming that the thrust of the rebuttal went to the issue of appellant's refusal to answer questions at the time of the arrest?

4. Was prejudicial error committed by allowing into evidence statements made by the appellant after he had indicated a refusal to participate further in the interview at the time of his arrest?

5. Was prejudicial error committed by the Trial Court's refusal to give either of the appellant's instructions regarding possession?

6. Was prejudicial error committed by the Trial Court's giving of instructions regarding accomplice testimony?

7. Was prejudicial error committed by the Trial Court's commenting on the evidence in the limited fashion that it did?

8. Was the appellant denied the right to an impartial jury by reason of the fact that the jurors had sat as jurors in prior similar cases?

9. Was the appellant denied the right to a speedy trial, considering the actual trial of the case occurred within three months of the offense, within three months of the arrest, within two months of the indictment, and within two months of the arraignment and plea?

B. Statement of the Facts

On March 17, 1965, at the Tecate port of entry in San Diego County, State of California, a 1959 Lincoln Continental arrived from Mexico into the United States. Reporter's Transcript, p. 7. There were two people in the car at that time, id. at 7. Russell Raymond Reinoehl was the driver, id. at 10, and appellant was a passenger. Id. at 8. Both parties identified themselves as to their citizenship, and made negative Customs declarations. Id. at 7.

Because both parties indicated that they lived in the Los Angeles area, id. at 11, Customs Inspector Joseph E. Grammer's suspicions were aroused as it seemed to him "that they were going a long ways out of their way to go home by coming through Tecate." Id. at 10. Thus, further examination was conducted, and proved negative as to the persons of both parties, but revealed marihuana in the vehicle. Id. at 8. The marihuana was found concealed in the right front fenderwell of the vehicle. Id. at 9. There were three kilo bricks, weighing about 7 pounds. Id.

Russell Raymond Reinoehl testified that on Monday, March 15, 1965, he attempted to purchase some marihuana from a man in the Wilmington area, near Los Angeles. Id. at 20. Appellant was with Reinoehl at the time of this attempted purchase. Id. at 21. They then went to the Sunland-Tujunga area, near San Fernando. Id. at 20-21. It was then decided that Reinoehl and appellant would travel to Mexico to purchase some marihuana. Id. at 21-22.

Both Reinoehl and appellant traveled to Tijuana on the afternoon of the 15th of March, with Reinoehl driving his vehicle there. Id. at 22. Appellant was the party who gave Reinoehl directions relative to the streets to be traveled in order to find where the marihuana could be purchased. Id. at 23. Appellant and Reinoehl were in a "partnership type thing," where Reinoehl was supplying the money, and appellant the information on where to purchase the marihuana. Id. Appellant apparently also contributed \$10 toward the total funds needed for the enterprise, including the purchase price of the marihuana and expenses of the trip. Id.

Appellant made the contact to purchase the marihuana on Monday, March 15, 1965, in Reinoehl's car. Id. at 24. The conversation between appellant and the vendor of the marihuana was in Spanish, id. at 25, and the exact nature of the conversation is unknown as Reinoehl does not speak Spanish. Id. at 24. At that time, a gun and money were given to this third person for the purchase of marihuana. Id. at 25.

Appellant and Reinoehl stayed overnight in a motel in Tijuana, id., but the marihuana was not to be delivered until the next day, Tuesday the 16th. Id. at 27. On that day, appellant was out of the presence of Reinoehl. Id. at 26. Appellant told Reinoehl that he was going to find out why the marihuana had not been delivered. Id. at 27.

On Wednesday morning, the 17th of March, 1965, appellant and Reinhoel drove to some person's house, where appellant walked in "and came out with the gunny sack, and handed it to . . ." Reinoehl. Id. at 27-28. Appellant then drove the car for a few minutes. Id. at 28. Appellant assisted Reinhoel in putting the marihuana in the fenderwell where it was found. Id.

Of the about 7 pounds of marihuana, part of it was Reinoehl's and part of it was the appellant's. Id. at 39. Reinoehl's share would have been two kilos. Id. at 40-41.

The chain of custody of the marihuana was established, id. at 44-48, and it was established that the vegetable matter was in fact marihuana. Id. at 47-48.

Appellant testified that he met Reinoehl on the afternoon of the 15th

of March, 1965, and it was suggested that they go to party in Tijuana.

Id. at 50-51. Reinhoel acted suspicious, wanting to go to several places.

Id. at 51-53. On Tuesday, March 16, 1965, because Reinoehl said he was not feeling well, they drove to Tecate, and were arrested. Id. at 53.

Appellant testified that he never say any marihuana in the car. Id.

Appellant testified that he never saw the packages containing the marihuana previously, Id. at 55. His first knowledge that there might be marihuana in the car came when Customs Inspector Grammer indicated that he was under arrest for smuggling marihuana. Id. at 54-55.

Appellant admitted that he spoke Spanish fluently. Id. at 55. On cross-examination, appellant testified that they had spent only one night in Tijuana, id. at 55, and thus they must have traveled together to Tijuana on Tuesday, March 16, 1965.

Appellant testified that on the trip from Tijuana to Tecate, a tire "got wobbly," and both he and Reinoehl "jacked it up, and took the tire off, and changed it around." Id. at 57. Previously, Reinhoel had testified that the marihuana was put in the fenderwell by taking off the front wheel, and taking the bolts off, and putting it in. Id. at 28. Customs Inspector Grammer testified that it took about 10 to 15 minutes to remove the marihuana from the place where it was secreted. Id. at 15-16.

Appellant testified that the reason for going from Tijuana to Tecate was that Reinoehl wanted to see the town that was torn up by the Hell's Angels in 1960. Id. at 59. Appellant testified that he never drove the car belonging to Reinoehl. Id. at 60.

On redirect examination of the appellant, appellant was asked if he had a conversation with Mr. Maxcy "down there at the time of your arrest," Id. at 61. The substance of the conversation was then related. Id.

On rebuttal, Customs Agent John Maxcy testified that he conducted an interrogation of the defendant at the time of his arrest. Id. at 62. Prior to the interrogation, appellant was advised that questions were going to be asked about marihuana that had been found in a vehicle in which he was a passenger. Id. Appellant was advised that he did not have to answer any questions, that he did have the right to an attorney, and that if he did answer any questions, anything he said could be used against him in any further court proceedings. Id. at 62-63. The interrogation was very brief. Id. at 63. Appellant said that he and his companion had departed the Los Angeles area the previous afternoon, and that he did not wish to answer any further questions without first consulting an attorney. Id. at 63. He was then asked if he would tell Customs Agent John Maxcy and a state narcotics agent by the name of Frank Maldonado (who was also present, id. at 62.) anything he knew about the marihuana. At that time, appellant said that if he knew anything about the marihuana, he did not believe that he would inform them. Id. at 63.

The value of 3 kilos of marihuana was established to be approximately \$60 to \$75.

IV.

ARGUMENT

A. THERE WAS SUFFICIENT EVIDENCE FROM WHICH TO FIND APPELLANT GUILTY OF BOTH COUNTS OF THE INDICTMENT.

Appellant argues that there was no showing by the government that appellant possessed the marihuana involved. Appellant's Brief, p. 9. It is alleged that actual possession at the time that the marihuana entered the United States was not shown, id., and that constructive possession was not shown either by virtue of the fact that "there was no evidence of dominion or control" by appellant. Id.

The starting point here is the exhaustive treatment of the definition of the term "possession" found in Hernandez v. United States, 300 F.2d 114, 116-19 (9th Cir. 1962). The salient features of possession include these:

(1) it is immaterial whether the marihuana be within the appellant's immediate physical custody, or, indeed, that it be physically in the hands of a third person, such as Reinoehl;

(2) "possession" can be actual as well as constructive;

(3) possession can be exclusive or joint;

(4) actual or constructive possession may be established by circumstantial evidence; and

(5) convictions will be upheld where possession, actual or constructive could be honestly, fairly and conscientiously inferred. Id. at 117.

It is the contention of the appellee that appellant in this case did exercise actual possession of the marihuana. The question of possession is not merely a matter of physical custody. The physical custody of the marihuana in this case was in the hands of Reinoehl, who was driving the car in which the marihuana was secreted. "Possession" involves the power to control the marihuana. Such "possession" was in the appellant in this case. Having planned to venture to Mexico for the express purpose of purchasing marihuana, Reporter's Transcript, pp. 21-22, having supplied the information where the marihuana could be purchased, id. at 23, having contributed funds to the enterprise, id., having conducted the negotiations with the vendor in Spanish, which Reinoehl could not speak, id. at 24, 25, having actually brought the marihuana from the vendor to the car, id. at 27-28, and having assisted in concealing it in the fenderwell, id. at 28, and expecting a portion of marihuana as his own, id. at 39, 40-41 - - all of these elements clearly go to establish appellant's dominion and control over the marihuana.

For purposes of argument, if the possession was not actual personal physical dominion, it most certainly was constructive. Possession through his agent Reinoehl was shown by the same evidence. This contention is based upon joint possession by both Reinhoel and appellant, and the evidence supra permits the inference of such joint possession.

Thus, the assertion by appellant that "there was no evidence of dominion or control." Appellant's Brief, p. 9, is erroneous, as is noted in appellant's own brief where he concedes that the evidence shows that

appellant planned to participate, and did in fact participate, in the purchase of the marihuana, as well as assisting its concealment in Reinoehl's vehicle. Id.

Appellant's argument against possession is based entirely upon the assumption that possession must be by one person or another, in this case, either Reinoehl or appellant. This assumption does not permit joint possession, which was inferable in this case. Although possession cannot be imputed, it can be joint, and joint possession is the substance of the appellee's contention that the evidence was sufficient to support the conviction on the first count.

The second count specifically charges that appellant was an aider and abetter of the concealment of the marihuana. The evidence that he assisted in placing it in the fenderwell, Reporter's Transcript, p. 28, is sufficient to convict on this count of the indictment. In addition, all of the factors brought out supra also bear on the issue of aiding and abetting the concealment of the illegally imported marihuana.

B. THERE WAS NO ERROR OF PROSECUTOR MISCONDUCT
ARISING FROM THE QUESTION RELATING TO A DISCUSSION
BETWEEN APPELLANT AND CUSTOMS AGENT JOHN MAXCY.

On cross-examination, this question was asked of the appellant:
"Do you recall making a statement to him [Customs Agent John Maxcy] that, quote 'Even if I knew anything regarding the

marihuana, or if I had smoked marihuana, I wouldn't tell you,'
unquote?" Reporter's Transcript, p. 58.

Appellant argues that the question was clearly outside the scope of direct examination. Appellant's Brief, p. 10. First, it should be noted that the objection raised at the time of the trial went to the relevancy and materiality of the question. Reporter's Transcript, p. 58, and not to whether it was within the scope of the direct examination.

Appellant states that the objection was properly sustained. Appellant's Brief, p. 10. However, the record reveals that the objection was overruled. Reporter's Transcript, p. 58.

The question was clearly proper. On direct examination, appellant alleged that he had no knowledge of the presence of the marihuana in the car. Id. at 53. This statement, made at the time of his arrest, was one from which a jury might infer that he did in fact have knowledge. It bore on the knowledge of the appellant, a matter which had been brought out on direct examination.

Appellant contends that the purpose of the question was to infer guilt of the appellant by his silence. Appellant's Brief, p. 10. Appellant then cites Griffin v. California, 380 U. S. 609 (1965) in support of the proposition that comment on silence is forbidden. First, Griffin involved commenting on the failure of the defendant to testify at the time of trial. Here, the appellant did testify at the time of the trial. Reporter's Transcript, 49-61. Appellant cites no authority for the proposition that failure to

communicate at the time of the commission of the offense is improper.

Even if the evidence were improper, it is submitted that the error is harmless. The Trial Court instructed the jury as follows:

"After taking a defendant into custody, arresting officers sometimes make accusatory statements to him, or in his presence, with a view to prompting some admission of guilt. An accusatory statement, as the term suggests, is a statement which in substance or effect accuses a person of guilt. The law does not require a defendant in custody to make any reply to any accusatory statement made to him, or in his presence, either orally or in writing, so neither the accusatory statement nor any failure to make reply thereto is evidence of any kind against the accused; that is to say, neither the accusatory statement nor any failure to reply thereto can create any presumption or permit any inference of guilt, and a defendant who is in custody has a perfect right not to make any statement at all." Id. at 88-89.

The instruction clearly vitiated any prejudicial effect that the question may have had earlier.

Moreover, whatever error existed in asking the question in cross-examination disappeared when the appellant testified on redirect examination about the conversation with Customs Agent John Maxcy after his arrest. Id. at 60-61. If evidence is disclosed by other testimony without

objection (as it was by appellant's redirect examination), any alleged error is harmless. Sorrentino v. United States, 163 F. 2d 627 (9th Cir. 1947).

Finally, the alleged error occurred in the cross-examination of the appellant. It is well-recognized that the limits of cross-examination are within the broad and sound discretion of the Trial Court. Glasser v. United States, 315 U. S. 60 (1941). This discretion will only be reversed for manifest error or abuse of discretion, United States v. Migliorino, 283 F.2d 7 (3d Cir. 1956), where it is prejudicial, and not where it is harmless. Sorrentino v. United States, supra.

C. THERE WAS NO ERROR IN PRESENTING REBUTTAL
TESTIMONY BY CUSTOMS AGENT JOHN MAXCY.

Appellant bases the alleged error on the reasoning set forth in Griffin. Once again, it must be pointed out that Griffin applies only to the failure of appellant to testify at the time of trial, and comment thereon. In this case, as noted supra, appellant did testify at the time of trial. Moreover, the Trial Court's instructions relative to his right to remain silent at the time of his arrest cured any error arising from the questioning of the appellant or in presenting the rebuttal testimony of Customs Agent John Maxcy.

However, it is quite evident that the rebuttal testimony of Customs Agent John Maxcy was quite proper. Appellant had gone into the nature of

any conversation between appellant and Customs Agent John Maxcy at the time of the arrest. Appellant went into this matter on redirect examination of appellant. Reporter's Transcript, pp. 60-61. Maxcy's version of the conversation was quite proper. Moreover, it had the effect of impeaching appellant by presenting contradictory testimony as to what was said by appellant at the time of the arrest. Finally, there was no objection raised to the rebuttal testimony of Customs Agent John Maxcy. Specification of error "shall quote the grounds urged at trial for the objection" Rule 18(2)(d) of The United States Court of Appeals for the Ninth Circuit. Appellant has not and cannot comply with this rule, due to his failure to urge an objection at the trial.

D. THERE WAS NO ERROR IN INTRODUCING STATEMENTS MADE
BY APPELLANT AFTER APPELLANT HAD DECLINED TO CONTINUE
IN THE INTERVIEW.

Once again, appellant brings for review a matter to which no objection whatsoever was raised at the time of trial. The alleged error is not the contravention of constitutional rights, and could not be as Miranda v. Arizona, 384 U. S. 436 (1966) is not retroactive to apply to this case, Johnson v. New Jersey, 384 U. S. 719 (1966). The objection takes the form of alleged prosecutor misconduct. The failure to promptly object and request the judge to charge the jury to disregard the argument or otherwise remedy the alleged misconduct precludes consideration of the matter on

appeal. Rule 18(2)(d) of The United States Court of Appeals for the Ninth Circuit.

Appellant alleges that the final question relative to whether or not appellant wanted to talk about the marihuana (coming immediately after appellant's expressed desire to terminate the interview) "amounts to a psychological coercion that has never been proper." Appellant's Brief, p.12. For this proposition, there is no authority cited. The failure to cite authority probably reflects a total absence of any for such a factual situation as presented in this brief. First, appellant was remarkably well-advised of his constitutional rights, considering that this interview pre-dated Miranda by one year, Reporter's Transcript, pp. 62-63, and that it was so brief, id. at 63. There is no indication of prolonged interviewing, or physical contact at all. The statement was not secured by "clearly improper means." Appellant's Brief, p. 12. Its introduction into evidence was not misconduct.

Finally, the statement testified to did materially add to the government's case, as it indicated a discrepancy between appellant's testimony and that of Customs Agent John Maxcy. It was impeachment, and permissible. It was not purposeful prejudicial solicitation of improper evidence.

E. THERE WAS NO ERROR IN THE TRIAL COURT'S REFUSAL
TO GIVE EITHER OF APPELLANT'S INSTRUCTIONS REGARDING
POSSESSION.

Refusal to give a requested instruction may be regarded as

reversible error only if (1) it is in itself a correct charge, (2) it is not substantially covered in the main charge, and (3) it is on such a vital point in the case that failure to give it deprives the appellant of a defense or seriously impairs its effective presentation. Pine v. United States, 135 F.2d 353 (5th Cir.) 1943, cert. denied, 320 U.S. 740 (1943).

Both of appellant's instructions fall on the third requirement, that of being vital to the defense of the case. The first instruction requires that "the undisputed direct proof" place the possession in some other person. Clerk's Transcript, p. 28. The simple fact is that there was no such "undisputed direct proof" of possession by some other person. The evidence whether the possession was exclusive in Reinoehl or joint between appellant and Reinoehl was in considerable dispute. See the argument under A, supra.

The second instruction starts with the proposition "if the defendant had neither physical custody nor control over alleged illegally imported narcotic drug." Id. at 29. The aforementioned evidence, supra argument under A, all goes to establish that appellant did exercise the requisite control.

With regard to the second requested instruction by appellant, the words of the Trial Court are pertinent here:

"I don't think this instruction on 'possession' is required here. The question is who the jury believes as to whether or not this defendant was in this venture as being a joint

venture." Reporter's Transcript, p. 78.

The point is: if the appellant was in fact a joint venturer in this enterprise, he had possession. Thus, any instruction relative to possession was unnecessary. Therefore, it could hardly be said to be vital to the defense.

F. THERE WAS NO ERROR IN THE TRIAL COURT'S REFUSAL
TO GIVE ADDITIONAL INSTRUCTIONS AS TO ACCOMPLICE
TESTIMONY.

First, appellant did not request additional instructions relative to the testimony of the accomplice. Second, appellant did not object to the accomplice instruction given. Appellant has thus failed to preserve the record with regard to this point raised on appeal. Rule 18(2)(d) of The United States Court of Appeals for the Ninth Circuit. Moreover, Rule 30, Federal Rules of Criminal Procedure, provides in part:

"No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. . . ."

It may be submitted that timely objection was raised. Appellant's Brief, p. 14. However, the objection was in the nature of a request for clarification. Reporter's Transcript, p. 98. Appellant's counsel felt that the Trial Court instructed the jury that they must believe that appellant told the truth beyond all reasonable doubt. Id. The Trial Court then

proceeded to clarify the matter by stating that to convict the testimony of the accomplice had to be believed beyond all reasonable doubt, and that his testimony should be viewed with great caution and care. Id. at 99.

Assuming that there was a timely objection, it was not plain error to give the instruction as rendered. As noted in Appellant's Brief, p. 13, the Trial Court twice advised the jury to view the testimony of the accomplice with great care and caution. Id. at 90, 95.

Appellant argues that the instruction was diminished by the Trial Court's comment that the sole question involved believing either the accomplice beyond all reasonable doubt, or the appellant. Appellant's Brief, p. 13. The comment allegedly vitiated the effect of instructing the jury to consider the accomplice testimony with great caution and care. Id. at 14.

It is submitted that the comment did not have that effect. The comment merely said that, viewing the accomplice testimony in the manner instructed, the question in the trial resolved itself to the credibility of the accomplice and appellant. It cannot logically be argued that the Trial Court removed the thrust of the accomplice instruction by his comment on the evidence in the limited manner which he did.

G. THERE WAS NO ERROR BY THE TRIAL COURT BASED UPON
THE LIMITED COMMENT BY THE TRIAL COURT ON THE
EVIDENCE.

The allegedly defective comment related to whether the jury

believed the testimony of Reinoehl or that of appellant. Appellant's Brief, p. 15. Appellant then argues that if the comment was proper, it destroyed the instruction on accomplice testimony. Id.

First, the latter portion of this argument had been discussed under F, supra. The remaining issue is whether the comment by the Trial Court was in itself defective and improper. For this proposition, appellant cites no authority.

Second, there was no objection at the time of trial to any comments made by the Trial Court. Rule 51, Federal Rules of Criminal Procedure, requires objection to be made at that time in order to save it for appellate review, unless it amounts to plain error under Rule 52(b). It can hardly be said that this comment was plain error. The Trial Court had indicated to the jury that they were entitled to disregard his comments, Reporter's Transcript, p. 99, when he made the comment, and this fact is noted in Appellant's Brief, p. 14. Moreover, the jurors were instructed that they were the sole judges of the facts in the case, Reporter's Transcript, p. 83, 89, 95, that they were the sole judges of the credibility of the witnesses and the weight that their testimony deserves, id. at 89, 95, and that they were at liberty to disregard any comment made on the evidence, id. at 96.

In the face of these instructions, it is submitted that it is difficult to see how any error, if error there was, was harmful.

Finally, it should be noted that no accomplice cautionary instructions are required by law. "The cautionary instruction, although desirable,

is not 'an absolute necessity.'" Audett v. United States, 265 F.2d 837, 847 (9th Cir. 1959).

H. THERE WAS NO DENIAL OF APPELLANT'S RIGHT TO
AN IMPARTIAL JURY BASED UPON THE JURORS' PREVIOUS
EXPERIENCE AS JURORS.

There is no authority cited for this proposition, either as a matter of constitutional law, or statutory law. Nor is there much authority lent to the conclusion by logic. It simply does not follow that continual exposure by a juror to particular types of offenses "creates an atmosphere of prejudice unfavorable to a defendant." Appellant's Brief, p. 16. The basis for this contention is not stated. In fact, it might be argued that such continual exposure works for the benefit of the defendant.

The proper manner in which to raise this issue was by way of a challenge to the panel or array. Although such a challenge might be made at various times, including perhaps even as late as the time of trial, it cannot be first made on appeal. Higgins v. United States, 160 F. 2d 222 (D.C. Cir 1946), cert. denied, 331 U. S. 822 (1947). Moreover, such a challenge must go to the merits and involve prejudice, and must be shown by the defendant. Brookman v. United States, 8 F. 2d 803 (8th Cir. 1925). Appellant has failed to make the requisite showing in this case.

I. THERE WAS NO DENIAL OF APPELLANT'S RIGHT TO SPEEDY TRIAL, WHERE TRIAL TOOK PLACE WITHIN THREE MONTHS OF THE OFFENSE, WITHIN THREE MONTHS OF THE ARREST, WITHIN TWO MONTHS OF THE INDICTMENT, AND WITHIN TWO MONTHS OF THE ARRAIGNMENT AND PLEA.

There is again no authority cited to support the proposition that a trial within the time periods involved violates the sixth amendment. In fact, there is authority directly contrary. In Mack v. United States, 326 F. 2d 481 (8th Cir.), cert. denied, 377 U. S. 947 (1964), the court held that trial within 6-1/2 months of the commission of the offense, within three months of the arrest, and within three months of the issuance of the indictment was a speedy trial. "First, from a standpoint of time, it is obvious that appellant received a speedy trial." Id. at 486. Mack involved a violation of the narcotic laws, namely the illegal importation of heroin, which is quite similar to the charge here, the illegal importation of marijuana.

In this case, as in Mack, the right to a speedy trial was not asserted by appellant. There the court said "it is settle law that in order to establish the right to a speedy trial under the Sixth Amendment this right must be asserted in some manner by the defendant or it is deemed waived." Id.

Appellant complains that the right to speedy trial is violated by the fact that the appeal is still pending some two years after the trial.

However, it should be noted that "the provisions of the Sixth Amendment guaranteeing a speedy trial contemplate the undue delay in the prosecution of a pending charge" Id. It does not contemplate the appeal, but only the trial of the offense charged. There is no authority linking the time that the appeal takes to the right to a speedy trial of the offense charged.

Finally, although the Clerk's Transcript is silent on the issue, appellant's brief was not received in appellee's office until March 2, 1967.

V.

CONCLUSION

The government respectfully submits that the appellant's conviction should be affirmed.

Respectfully submitted,

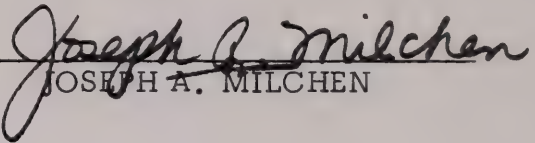
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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.


JOSEPH A. MILCHEN

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLYDE BATES and MANUEL JOE CHAVEZ,
Petitioners and Appellants
vs.

LAWRENCE E. WILSON, Warden,
San Quentin Prison,
Respondent and Appellee.

✓
No. 21366

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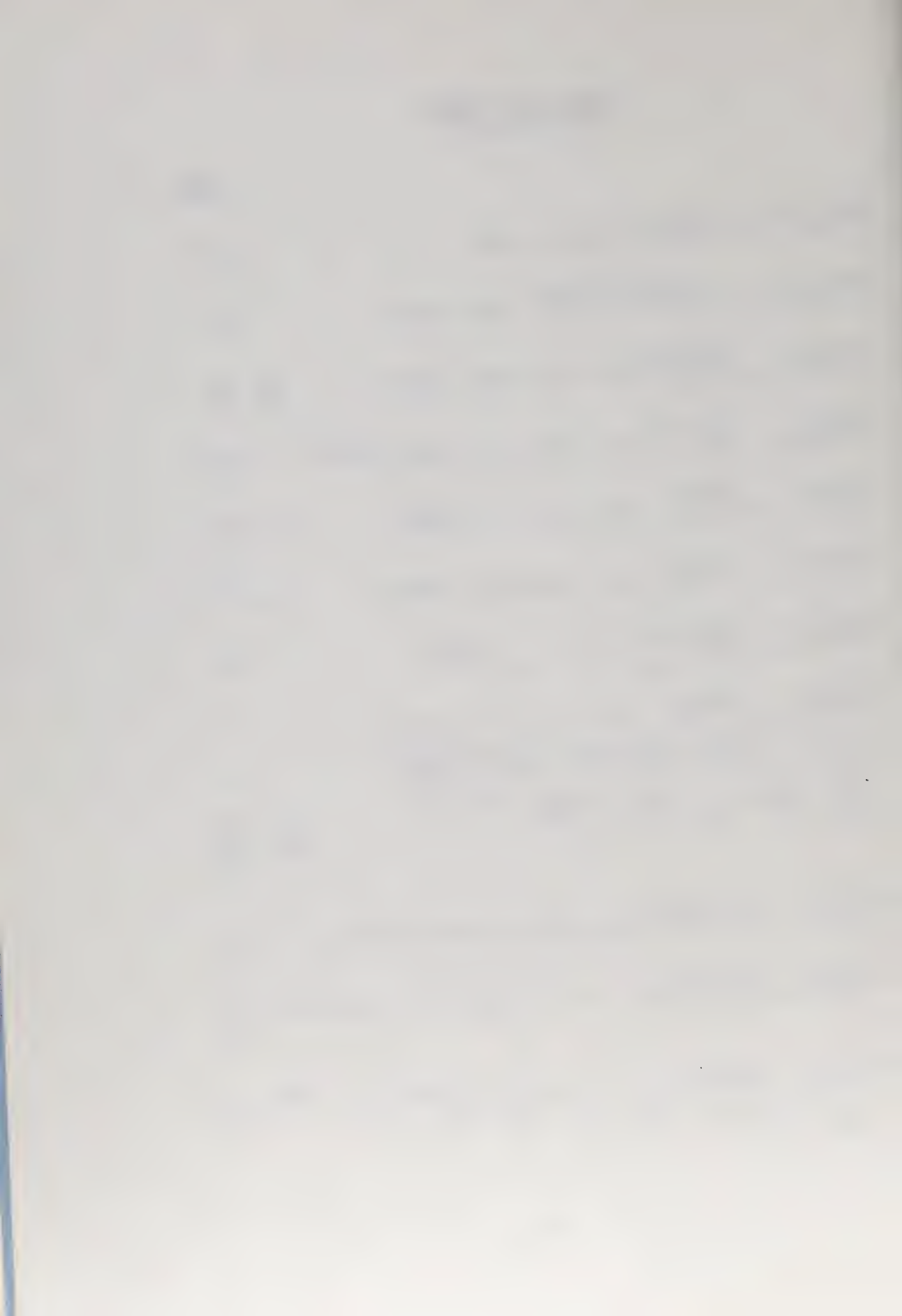


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APPELLEE'S BRIEF

JURISDICTION

This is an appeal from an order denying a petition for a writ of habeas corpus sought by two state prisoners. The jurisdiction of this Court is conferred by Title 28 United States Code section 2253 which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when a certificate of probable cause has issued.

STATEMENT OF THE CASE

A. Prior Proceedings in State and Federal Courts.

Appellants were jointly tried in the Los Angeles Superior Court on six counts of murder in

violation of California Penal Code section 189, and one count of arson in violation of section 448a. They were tried along with Manuel Hernandez. Each was convicted on all counts. Appellants were sentenced to death, while Hernandez received life imprisonment. Appellants' convictions were affirmed by the California Supreme Court. People v. Chavez, 50 Cal.2d 778, 329 P.2d 907 (1958), cert. denied, Chavez v. California, 358 U.S. 946, 79 S. Ct. 356 (1959), and Bates v. California, 359 U.S. 993, 79 S. Ct. 1126 (1959).

Bates filed a petition for a writ of habeas corpus in the California Supreme Court on January 3, 1958, which was denied on January 23, 1958. In re Bates, Crim. No. 6196 (Calif. Sup. Ct., Jan. 23, 1958).

On August 4, 1959, Chavez filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California, Southern Division (No. 38423). He was joined by Bates who filed a similar petition on August 6 (No. 38427). Both petitions were denied on August 7, 1959.

Appeals were filed in the United States Court of Appeals for the Ninth Circuit (Nos. 16590, 16622) and on June 16, 1960, the cases were remanded for hearing on specified issues. Chavez v. Dickson, 280 F.2d 727

(1960), cert denied, 364 U.S. 934, 81 S. Ct. 379
(1961), rehearing denied, 366 U.S. 922, 81 S. Ct.
1092 (1961). On this appeal, the order of the district
judge in denying the writ was upheld as to most of
the issues:

(1) The construction placed upon sections
448a and 189 of the California Penal Code by the
California Supreme Court in People v. Chavez, 50 Cal.
2d 778, 329 P.2d 907 (1958), was not arbitrary or
unreasonable, nor did it amount to an ex post facto
law;

(2) The failure to object at trial to
assertedly prejudicial remarks of trial judge and
prosecutor barred collateral attack;

(3) A remark of the prosecutor to which
objection had been made did not result in a denial of
due process;

(4) Since the statements made by Hernandez
and Oscar Brenhaug were not admitted against Chavez,
and because the trial court so instructed the jury,
no federal question was presented as to him;

(5) Since the Hernandez statements were
also not admitted against Bates, with a similar caution-
ary instruction to the jury, no federal question was
presented in regard to that issue;

(6) The admissibility of the Brenhaug statement against Bates was an issue of state law and did not present a cognizable federal question; and

(7) The prejudicial effect of photographs taken at the scene of the fire was not subject to habeas corpus review in light of prior state determination of admissibility.

The cases were remanded for an evidentiary hearing, however, on two issues:

(1) Whether or not the transcriptions of the Hernandez and Brenhaug statements were so grossly inaccurate as to deprive appellants of a fundamentally fair trial; and

(2) Whether or not the admission into evidence of photographs of the victims taken after the victims had been removed from the scene of the crime were so prejudicial as to deprive appellants of due process.

On remand, hearings in the United States District Court were held, and the petitions were again denied on July 11, 1961. Appeals were filed in the United States Court of Appeals for the Ninth Circuit. The decision of the District Court, denying the

petitions, was affirmed. Chavez v. Dickson, 300 F.2d 683, cert. denied, 371 U.S. 880, 83 S. Ct. 151, rehearing denied, 371 U.S. 931, 83 S. Ct. 295 (1962). It was held therein that the transcripts of the Hernandez and Brenhaug statements were substantially accurate and any inaccuracies were not prejudicial. It was also concluded that the admission of allegedly "gruesome" photographs was not a deprivation of due process.

On January 30, 1963, Bates filed a petition for a writ of habeas corpus in the California Supreme Court which was denied on February 6, 1963. In re Bates, Crim. No. 7318 (Calif. Sup. Ct., Feb. 6, 1963).

On March 1, 1963, Chavez filed a petition for a writ of habeas corpus in the California Supreme Court which was denied on March 13, 1963. In re Chavez, Crim. No. 7338 (Calif. Sup. Ct., March 13, 1963).

B. Present Proceedings.

Preliminary Pleadings.

On February 26, 1963, Bates filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California, Southern

Division (No. 41325; CT 1-33).^{*} He was joined by Chavez in an identical petition filed on the same day (No. 41326; CT 36-68).

On February 26, 1963, both appellants filed petitions for a stay of execution; their executions having been scheduled for the following day (CT 76-83). Orders staying execution were entered immediately (CT 84-85).

On March 11, 1963, Bates filed a supplemental petition for a writ of habeas corpus (CT 86-101), which contained five additional affidavits (CT 95-100). On the same date, Chavez filed an amended petition (CT 102-16).

On March 19, 1963, the respondent filed his return (CT 118-35). A traverse to that return was filed on March 25, 1963, on behalf of Chavez (CT 136-41). Bates also filed a traverse on March 25, 1963 (CT 142-48), together with ten additional affidavits (CT 146-47, and on unnumbered pages appearing between CT 147-48).

^{*}The following abbreviations will be used to designate pages of the various transcripts:

- (1) "TT" -- Reporter's Transcript of the 1957 Trial
- (2) "CTT" -- Clerk's Transcript of the 1957 Trial
- (3) "HCT" -- Reporter's Transcript of the 1964
Habeas Corpus Hearings
- (4) "CT" -- Clerk's Transcript of the present case

The First Order: February 24, 1964.

On February 24, 1964, an order was issued that distinguished between those issues which could be determined without an evidentiary hearing and those issues which could not (CT 293-311). Bates v. Dickson, 226 F.Supp. 983 (N.D. Cal. 1964).

The issues disposed of by a thorough review of the state court record without an evidentiary hearing were as follows:

(1) In his original petition, Bates had claimed that he had been convicted of "murder by torture," a crime not charged, but this contention was denied as not raising a federal question (CT 298-99). This issue has not been pursued on appeal.

(2) Bates' claim that trial counsel was incompetent by not presenting evidence of Bates' hypersensitivity to alcohol was denied after a review of the trial court record (CT 301-02).

(3) Bates' claim that he was forced to be a witness against himself when he was interrogated about his prior felony convictions, and that the convictions were not properly authenticated, was denied (CT 302-03).

(4) This order also denied a claim of Chavez that he was deprived of due process because a juror made

a post-conviction statement that Chavez could not be believed because he was a member of a "rat-pack" gang, and that trial counsel was not adequate because he did not pursue the issue (CT 303-04). This point has not been urged on appeal.

A number of issues were to be determined after an evidentiary hearing.

(1) The first was whether or not illegally seized evidence had been used against both appellants (CT 304). Bates claimed that after he was arrested, the police returned to his home and seized his automobile, after which it was driven to the police station and searched without a warrant (CT 305). In addition to joining in Bates' claim, Chavez asserted that the jacket used as evidence against him was discovered in the course of an illegal search of his home (CT 305). A hearing on these issues was deemed necessary in light of the decisions in Mapp v. Ohio, 367 U.S. 643 (1961), and California v. Hurst, 325 F.2d 891 (9th Cir. 1963) (giving Mapp retroactive application) (CT 309-10).

(2) Another issue involved the so-called "accusatory statements" (CT 304). Both Bates and Chavez alleged that statements were used against them at trial which were taken during a period of police custody and

before any of the declarants had been advised of their constitutional rights (CT 306). The hearings were deemed essential to determine the voluntariness of those statements (CT 310).

(3) The last issue was that of inadequate assistance of counsel. This claim was grounded upon the failure to appellants' trial counsel to object to either the evidence allegedly illegally seized or the allegedly involuntary statements (CT 304, 308).

The 1964 Hearings.

Hearings were held on May 11-15, 18-19, and 22, 1964 (see Reporter's Transcript). The matter was ordered submitted on June 17, 1964 (CT 391).

Respondent's Linkletter Motion.

On July 8, 1965, respondent filed a motion seeking dismissal of the proceedings (CT 314-15). The motion was based upon Linkletter v. Walker, 381 U.S. 618, 85 S. Ct. 1731 (1965), which refused retroactive application of Mapp, and upon the points and authorities previously cited by respondent (CT 317-18). On July 9, 1965, it was ordered that the submission of the matter be set aside, giving both parties further time within which to submit briefs deemed necessary due to respondent's motion (CT 321-22).

The Final Order.

On June 29, 1966, the petitions were denied (CT 367-72). A certificate of probable cause was issued on July 1, 1966 (CT 374). Notice of appeal was filed on July 26, 1966 (CT 375).

C. Executive Clemency.

On December 22, 1966, the Governor of the State of California granted to both appellants a limited commutation of sentence. Bates' sentence was commuted to life imprisonment without possibility of parole [see Appendix, Exhibit A]. Chavez' sentence was commuted to life imprisonment [see Appendix, Exhibit B].

D. Statement of Facts: 1957 Trial.

On April 4, 1957, Oscar Brenhaug and appellant Bates had some drinks at a bar. After leaving it, they met appellant Chavez and Manuel Hernandez and all four drove to the Corner Bar in Chavez' car. Subsequently they drove to the Mecca Bar, arriving at about 9:30 p.m. and taking a booth. The waitress was unable to obtain an I.D. card from Hernandez, so the bartender asked for identification from him and from Chavez. When Hernandez stated he had none, and Chavez refused to show any, the bartender refused to serve them. (TT 101, 140-45, 364-74, 384, 885, 894-98, 951).

The four men approached the bar. Chavez and Bates asked some girls to dance; Chavez dancing with Herminia Morales, a patron, and Bates with the waitress, Joyce Chapdelaine. Bates, Chavez and Hernandez subsequently asked to dance with Miss Morales, but were all refused. Chavez kept putting his arm around her and all three men began to talk abusively. The bartender, noticing that the girls were being annoyed, told the men to be quiet or leave. An argument began and the bartender asked a customer to aid him in ejecting the foursome. Bates, Chavez and Hernandez were shoved outside, whereupon Bates and Chavez fought with the bartender and the assisting

customer. When the fight ended, either or both Bates and Chavez declared that they would come back to get even. Soon thereafter one or both of the appellants re-entered the bar to get Brenhaug who, being in a drunken stupor, had remained inside during the fracas. (TT 18-28, 50, 88-89, 145-59, 165-69, 248-60, 329-32, 336, 361, 379-89, 500, 552-55, 560-61, 599, 902-04, 955-56.)

After being thrown out of the Mecca Bar, the four men got into Chavez' car and drove away. Either Bates or Chavez declared that they were "going back and get even with them." On the way, Bates got out of the car and obtained a five-gallon bucket. Thereafter the four changed cars, all getting into Bates' light-blue Plymouth sedan. Bates, who was driving, stopped the car and he and Hernandez walked to a gas station where they had the bucket filled with gasoline. They then drove back to the Mecca Bar and double-parked in front. Bates, Chavez, and Brenhaug climbed out. Brenhaug, who said "I don't want to get in no trouble," was shoved back inside and Bates ordered him to stay there. Hernandez sat behind the wheel and kept the engine running. Bates carried the bucket to the open door of the bar, and as he sloshed the gasoline inside, shouted "I will get everyone of you in there." Chavez threw in a lighted book of

matches and the bar exploded into flames. Six customers were killed in the inferno, while two others were badly burned. Bates and Chavez leaped into the waiting car and it sped away. Hernandez drove to the Corner Bar and all except Brenhaug went inside. Brenhaug fell asleep in the car. At 2:00 a.m., after the bar closed, they drove towards Bates' house, letting Chavez and Hernandez out along the way. Bates parked in his driveway and both he and Brenhaug went to sleep. (TT 169-84, 280-94, 307-12, 389-403, 439-44, 519-22, 567-74, 593-97, 652-78, 713-25, 787-92, 861-62, 867, 904-24, 966-67, 981-99, 1004-06, 1129-31, 1227-54, 2402.)

At about 3:00 a.m. on the morning of April 5, 1957, Officers Clyde Call and Richard Irwin of the Los Angeles Police Department went to the Bates residence. Pursuant to directions given and information received through official channels, they had gone to the home of Lyle and Robert Jacobsen in search of information about one of the participants in the crime who was known as "Oscar." The Jacobsens led the officers to the Bates house where they found a man identified as "Oscar" asleep in a car. When the car door was opened, a strong smell of gasoline came from inside. The floor mat was stained and the car tailpipe was also warm. The occupants,

Brenhaug and Bates, were arrested. (TT 1278-89, 1327, 1340.)

At 5:00 a.m. a chemist examined the auto which had been taken to the police garage. Both wine and gasoline were detected inside the car, and a small piece of floor mat was removed. The matting was not subjected to chemical tests. Instead, the chemist preserved it in a jar and the jury was permitted to examine for themselves the validity of the chemist's olifactory analysis. (TT 1173-80.)

In the afternoon of April 5, 1957, Officers Everett Cummins and Robert Sluder went to Chavez' home. Mrs. Chavez showed them the jacket her husband had worn the night before. When Chavez arrived home from work, he was arrested. Though the officers had not told him why they were there, he said, "I have been expecting you all day." Before leaving Chavez gave his wife some money and directed her to obtain a lawyer. The officers asked him to bring his jacket with him. (TT 1262-72.)

The next day Hernandez was arrested. He too was not told the reason for his arrest, but himself stated that he was being arrested for the Mecca Bar fire. In a conversation which occurred at the police station on April 7, Hernandez related the events in detail, noting that

Brenhaug did not want to take any part in the crime and suggesting that he had been reluctant himself. (TT 1357-90, 1433-49.)

On April 9, 1957, the four accused were brought together for an interview and were asked to tell what had happened on the night of April 5. Brenhaug spoke first, and related the events in detail. Hernandez agreed that Brenhaug's version was, for the most part, correct. Chavez said that Brenhaug and Hernandez were lying, and that he had had nothing to do with the fire. Bates claimed that he could remember only fragments. (TT 1463-1512.)

Hernandez did not take the stand and his witnesses did not suggest any sort of defense (TT 1537-62). Chavez' defense was that after the fight at the Mecca Bar, he had gone home (TT 1565-1842). Bates' defense was that he had drunk so much alcohol, starting early in the day, that he could remember only fragments (TT 1843-2051).

In rebuttal, one witness testified that Bates was not drunk as of the afternoon of April 4 (TT 2065-76). A police chemist also testified that had anyone consumed as much liquor as Bates claimed he had, he would have been comatose and incapable of any physical activity by early

afternoon (TT 2235-51, 2273-75), and by evening he would have been dead (TT 2275-79).

E. Statement of Facts: 1964 Hearings.

Evidence taken at the habeas corpus hearings in 1964 was limited to the issues of (1) illegal search and seizure, (2) illegally-taken statements, and (3) incompetent counsel (CT 304-11).

Search of the Bates Car.

Soon after the Mecca Bar fire, Sergeant Tidyman, who was conducting the investigation, was informed by Joyce Chapdelaine, a waitress there, that one of the men who had thrown the gas was named "Oscar" and was known by the Jacobsen brothers, while another looked like Officer Otis Green and was a "brother" of the Jacobsens. Tidyman instructed Officers Clyde Call and Richard Irwin to contact the Jacobsens and see if they would direct the officers to "Oscar." (HCT 588-90, 651, 657, 675, 700.)

The two officers went to the Jacobsen home and inquired about "Oscar." (HCT 334, 366-69, 399, 429.) The Jacobsens led the officers to the Bates residence where, in the driveway, a car was found which matched the description of that seen speeding from the scene of the crime. (HCT 341, 368-70, 399, 462.) Inside it were a man identified as "Oscar" and another

who looked like Otis Green -- the descriptions fitting those of two of the participants in the crime. (HCT 339-41, 344, 348, 366, 369, 429, 436-37.) When the car door was opened, a strong smell of gasoline came from inside. (HCT 368-69, 371-72, 435.) The tailpipe was felt and found to be warm. (HCT 437-38). Both Bates and Brenhaug were then arrested and taken to the 77th Street police station.

Before leaving with their prisoners, Irwin locked Bates' car (HCT 373, 567). The officers intended to return after delivering the suspects to the police station, since they were mindful of the volatile nature of gasoline (HCT 439-41, 445, 567). Upon hearing that they smelled gasoline inside the car, Tidyman instructed them to return and drive it to the station for chemical examination (HCT 442, 592-93). The car arrived at the station at about 5:00 a.m. (HCT 393-94, 695). Tidyman then instructed a chemist to make an immediate examination of the car (HCT 593). No warrant was sought since Tidyman felt that, due to the volatile nature of gasoline, the evidence would literally evaporate before the courts were open and a warrant could be procured (HCT 658-59, 695-97).

Seizure of Chavez' Jacket.

After identifying themselves as police officers, Officer Robert Sluder and his partner were invited into the Chavez residence by Mrs. Chavez (HCT 737, 748, 847). The actual circumstances surrounding the sighting of the jacket were subject to two conflicting versions. Mrs. Chavez testified that the officers asked if they might look in a closet at one of her husband's jackets and that she gave them permission to do so (HCT 717, 721-25, 749-52, 757-59). Officer Sluder stated that after being asked if she would show them the jacket her husband had worn the night before, Mrs. Chavez went to the closet and brought it to them, later putting it back in the closet (HCT 854-56). Mrs. Chavez voiced no objections to anything the officers did (HCT 750-51, 757-59). When Chavez arrived home and was arrested, the officers told him to get this jacket (HCT 882-83, 901).

Illegally-Taken Statements.

All three principals in the crime testified as to the circumstances of interrogation and custody. Hernandez claimed that he had been terrorized with threats of the gas chamber if he didn't cooperate by corroborating the Brenhaug statement (HCT 68, 70, 215-17, 220-21, 230-36). He also stated that he had been promised release if he

confessed and that all of his statements were fabrications to ensure advantageous treatment by the police (HCT 34-35, 39-40, 86-87, 91, 116-23, 128, 151-57). He denied knowledge of the crime. Both interrogating officers, however, testified that Hernandez was not threatened or promised immunity or leniency, that the gas chamber was never mentioned, that Hernandez' first admissions (which were given before he was apprised of Brenhaug's statements) were substantially identical to those following, and that Hernandez had never denied knowledge of the crime (HCT 604, 607-12, 621-22, 660, 665-68, 809-10, 824-25, 832). The first admission, the substance of which did not vary from subsequent admissions, was obtained shortly after the first interrogation of Hernandez had begun (see HCT 602-03, 1021, 1028).

Chavez claimed that he had been told he was going to the gas chamber if he didn't cooperate with the police, that he had been handcuffed to a chair for twelve to fourteen hours during interrogation, and that his numerous requests for an attorney had been denied (HCT 886-89, 891-92). He also declared that he had never confessed and had refused to say anything until he had spoken to his attorney (HCT 922, 925-26). The interrogating officers, however, testified that no threats against Chavez had ever

been made, and that he was never subjected to twelve hours of continuous handcuffing or interrogation (HCT 1012, 1020-21, 1025-26).

Bates gave no testimony suggesting coercion (see HCT 970-1000).

Incompetent Counsel.

"At the time of the evidentiary hearing no affirmative showing was made, nor was any evidence adduced or otherwise produced, regarding the asserted inadequacy of counsel."
(CT 371)

APPELLANT'S CONTENTIONS

1. The failure of appellants' trial counsel to object to the introduction of illegally-seized evidence requires the granting of the writs.

2. The introduction into evidence of the "accusatory statements" deprived appellants of due process of law and requires a reversal of the judgment.

A. Johnson v. New Jersey did not preclude an examination into this question.

B. The record shows that, even if "not oppressive," the questioning that resulted in the "accusatory statements" was psychologically of such a nature as to require a reversal of the order below.

3. Recent decisions establish that the use of an extrajudicial statement, without opportunity to cross-examine, is a denial of due process of law.

4. The harmless-error rule cannot save these convictions.

5. Points applicable only to appellant Bates:

A. The failure of Bates' trial counsel to call witnesses to establish his defense of diminished responsibility deprived him of due process of law.

B. The use made of his prior convictions deprived Bates of due process of law.

SUMMARY OF APPELLEE'S ARGUMENT

I. The failure of appellants' trial counsel to object to allegedly illegally-obtained evidence does not establish that appellants were denied the effective representation of counsel.

A. The search of the Bates car was legal.

B. The seizure of the Chavez jacket was legal.

C. Counsels' restraint in refraining from making frivolous objections was not incompetence.

II. The use of the Hernandez admission and the joint statement did not deprive appellants of due process.

A. The Johnson case precludes an examination of the question of whether either appellants or Hernandez were advised of their constitutional rights and waived those rights.

B. The reading of neither the Hernandez admission nor the joint statement prejudiced either Bates or Chavez.

1. The Hernandez admission was not received against either Bates or Chavez.

2. The joint statement was not received against Chavez.

3. The joint statement was admitted against Bates only insofar as his own conduct manifested an admission, but the use thereof did not constitute federal error.

4. It is not federal constitutional error to receive a confession or admission of one defendant in a joint trial, even though the confession or admission implicates his codefendants, when the jury is given limiting instructions.

C. The claim that Hernandez was coerced does not result in federal constitutional error as to Bates and Chavez.

D. Hernandez was not coerced.

III. Appellants were not denied the opportunity to cross-examine a witness against them.

IV. Application of California's harmless-error rule does not raise a federal question.

V. Trial counsel adequately presented appellant Bates' defense of diminished responsibility.

VI. Appellant Bates was not deprived of due process when his prior convictions were mentioned.

A. The restriction of Bates' explanation of his prior convictions was neither prejudicial nor erroneous.

B. The instructions, limiting the use to be made of the prior convictions, precluded prejudice.

C. Failure to object precludes Bates from now complaining that he was "forced" to admit the prior convictions.

D. Bates cannot attack the constitutionality of the prior convictions on the grounds established by Arketa.

ARGUMENT

I

THE FAILURE OF APPELLANTS' TRIAL
COUNSEL TO OBJECT TO ALLEGEDLY
ILLEGALLY-OBTAINED EVIDENCE DOES
NOT ESTABLISH THAT APPELLANTS WERE
DENIED THE EFFECTIVE REPRESENTATION
OF COUNSEL

Appellants' claim that trial counsel were so incompetent that the trial became a farce and a sham in the constitutional sense because they failed to object to the admission of two items of evidence: matting from the Bates car and Chavez' jacket. But as Judge Carter observed in his final order of June 29, 1966, "The real questions raised by the evidence [during the hearings] were whether there was an unlawful search and seizure in connection with Bates' car, and in connection with Chavez' jacket" (CT 371). The present assertion of incompetent counsel is only a thinly-veiled attempt to avoid the effect of Linkletter v. Walker, 381 U.S. 618, 85 S. Ct. 1731 (1965).

Commencing with the filing of the present petitions in February, 1963, and continuing through the evidentiary hearing in May, 1964, the principal claim of the petitioners was that illegally-obtained evidence had been used against them and that consequently, their convictions were vulnerable under the rule of Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1084 (1961). The brightest gem in their firmament of claims was the search of

Bates' car. Since the car was examined at the police station and part of the floormat removed without a warrant some two hours after Bates was arrested and the car seized at his home, petitioners tried to bring themselves under the protective arm of Preston v. United States, 376 U.S. 364, 84 S. Ct. 11 (1964). They also attacked the taking of Chavez' jacket when he was arrested on the ground that his wife had not consented to the previous so-called search which disclosed that jacket.

In response to these claims, the State argued first that the petitioners should have objected at trial since California law at that time (1957) made the product of an unreasonable search and seizure inadmissible. Secondly, the State contended that the searches were reasonable.

As a kind of replication to the State's plea of waiver, the petitioners argued, well, if the privately-retained attorneys for Bates and Chavez failed to object to this evidence, then this proves that they were incompetent.

The major issue in the case was suddenly removed in June of 1965 by Linkletter v. Walker, 381

U.S. 618, 85 S. Ct. 1731 (1965). Since the petitioners' convictions were final in the Linkletter sense by 1959 when certiorari was denied by the United States Supreme Court, some two years prior to the decision in Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1084 (1961), it became immaterial whether evidence used against them was the product of an unreasonable search and seizure in violation of the Fourth and Fourteenth Amendments. The district judge so held (CT 370).

In a last, final gasp of desperation, petitioners' argument comes full circle and they claim a denial of due process of law because their trial attorneys failed to exclude the evidence in question under state -- not federal -- law.

Their present grievance concerns the "failure of trial counsel to object to the receipt of this evidence -- an objection which, in California, would have been good in the light of People v. Cahan, . . ." (AOB 9). But appellants have failed to cite a single California case which would support their claim that the searches and seizures herein were illegal. The absence of any supporting authority, we suggest, is compelled by the fact that, under California law, the searches and seizures were both

legal.

A. The Search Of The Bates Car Was Legal.

Pursuant to directions given and information received through official channels, police officers went to the Jacobsen home in search of information about one of the participants in the crime who was known as "Oscar" (TT 1281; HCT 334, 366, 368-69, 399, 429). The Jacobsens led the officers to the Bates residence where they found a car matching the description of that seen speeding from the scene of the crime (TT 1287; HCT 341, 368-70, 399, 462). Inside it were a man identified as "Oscar" and another who looked like Officer Otis Green -- the descriptions fitting those of two of the suspects (HCT 339, 341, 344, 348, 366, 369, 429, 436-37). When the car door was opened, a strong odor of gasoline came from inside (TT 1288-89; HCT 368, 371-72, 435, 564, 584-85).

These observations, linking the occupants of the car to the crime, were sufficient to justify the arrest of Bates and Brenhaug. E.g., People v. Woods, 139 Cal.App.2d 515, 523-24, 293 P.2d 901, 907 (1956), cert. denied, 352 U.S. 1006, 77 S. Ct. 566 (1957); People v. Coleman, 134 Cal.App.2d 594, 599, 286 P.2d 582, 585-86 (1955). An arrest made with reasonable

cause therefore permits a search incidental thereto and without a warrant for purposes of seeking evidence related to the crime. People v. Webb, 66 A.C. 99, 424 P.2d 342 (1967); People v. Borbon, 146 Cal.App.2d 315, 319, 303 P.2d 560, 563 (1956) (search of auto incident to arrest); People v. Winston, 46 Cal.2d 151, 162-63, 293 P.2d 40, 46-47 (1956).

Where a valid arrest has been made, and where a search of an automobile as incident to that arrest has disclosed incriminating evidence, it is permissible for police officers to lock that vehicle, remove the accused to a place providing secure detention, return to the vehicle and move it to a police station, and then search the vehicle at the place to which it has been removed, all without a search warrant. People v. Talbot, 64 Cal.2d 691, 708-09, 414 P.2d 633, 644-45 (1966), cert. denied, 385 U.S. 1015, 87 S. Ct. 729 (1967). In Talbot, the accused was arrested at his home on suspicion of murder. One of the arresting officers noticed smears of what appeared to be human blood on Talbot's car which was parked nearby. The doors and trunk of the car were sealed with stickers and the car was

removed to the police station. Several days later, the seals were broken and criminalist examined the interior, dusting for fingerprints and making blood tests. The California Supreme Court held that once it became apparent that the smears were human blood, it was both reasonable and proper to seal the car for later and more scientific examination.

"This finding [a presumptive test for blood], in conjunction with the surrounding circumstances, warranted a reasonable search of the entire automobile, and it was proper to seal the trunk area for a later, more scientific examination as part of the reasonable search process.

"

"Under the circumstances, the sealing of the trunk was the initial step taken in the process of scientific investigation, and the actions of the authorities with reference to the automobile were proper." Ibid.

In the present case, the investigating officers had found a car matching the description of that used by the participants in the crime, inside the car were two men fitting the descriptions of two of the suspects, and from inside the car emanated the

odor of gasoline which was the instrumentality by which the crime had been committed. "This finding, in conjunction with the surrounding circumstances, warranted a reasonable search of the entire automobile" Id., 64 Cal. 2d at 708, 414 P.2d at 644. After removing the suspects from the car, the police officers rolled up the windows, locked the doors, and took the keys (HCT 373, 566-67). The car was subsequently removed by the same arresting officers, taken to the police station, and examined by a chemist.

The Talbot case establishes the permissibility of what might be termed a "continuing search." It holds that if, at the time of arrest, the police officers could have conducted an extensive examination of the vehicle, it is not unreasonable to secure the contents thereof from destruction or tampering such that the evidence may be preserved for later scientific examination, and that such a subsequent search of the secured vehicle is to be considered in the same light as a search conducted at a time contemporaneous to the arrest. Id., 64 Cal.2d at 708-09, 414 P.2d at 644-45. Such a permissible method was

employed with reference to the Bates vehicle and is not subject to objection.

The search herein was also reasonable on another ground: that of emergency. In People v. Terry, 61 Cal.2d 137, 152-53, 390 P.2d 381, 391 (1964), cert. denied, 379 U.S. 866, 85 S. Ct. 132 (1964), a search of an automobile was upheld though that search was removed in both time and place from the arrest of the defendant. In People v. Burke, 61 Cal.2d 575, 580, 394 P.2d 67, 70 (1964), the Terry case was distinguished from Preston v. United States, 376 U.S. 364, 84 S. Ct. 881 (1964), on the ground that had the police officers been compelled to obtain a search warrant before searching the vehicle, the evidence might have been destroyed. The Terry case was an example of an emergency created by an external factor: the return of the accused, who had escaped from the police, would have resulted in a loss of the evidence. In People v. Huber, 232 Cal.App.2d 663, 43 Cal.Rptr. 65 (1965), however, the emergency was created by an inherent factor: the nature of the evidence was such that it would destroy itself if not immediately seized. Huber involved a blood sample taken from an injured and

unconscious driver who was strongly suspected of being drunk.

"[I]t was taken for the purpose of reducing the alcohol in the defendant's blood to possession -- to protect the alcohol content in the blood from destruction and preserve it for presentation to the court. There was no other way to prevent the disappearance or destruction of the evidence"

Id., 232 Cal.App.2d at 670-71, 43 Cal. Rptr. at 69-70.

From the evidence presented below it is abundantly clear that the official in charge of the investigation and who ordered the search of the Bates car did not seek a warrant because he felt that, due to the volatile nature of gasoline, the evidence would literally evaporate before the courts would open and a warrant could be procured (HCT 658-59, 695-97). This factor -- the volatility of the gasoline -- which was inherent in the very nature of the evidence itself, created an "emergency" which permitted, under California law, a search without a warrant. People v. Terry, *supra*, 61 Cal.2d at 152-53, 390

P.2d at 391, as explained in People v. Burke,
supra, 61 Cal.2d at 580, 394 P.2d at 70; ibid.

B. The Seizure of the Chavez Jacket
Was Legal.

It is also evident that Mrs. Chavez consented to the search which resulted in the discovery of Chavez' jacket (see HCT 717, 721-25, 737, 741-42, 748-52, 757-59, 847, 854-56). Under the rules set out in People v. Carter, 48 Cal.2d 737, 746, 312 P.2d 665, 670 (1957), the search was proper.

"When the husband is absent from the home it is the wife who controls the premises, . . . and with her husband's tacit consent determines who shall and who shall not enter the house on business or pleasure and what property they may take away with them When the usual amicable relations exist between husband and wife . . . , and the property seized is of a kind over which the wife normally exercises as much control as the husband, it is reasonable to conclude that she is in a position to consent to a search and seizure of property in their home.

If . . . [defendant's wife] freely consented to the removal of defendant's property, there was no unreasonable search or seizure" Ibid.

The Carter case clearly holds that where clothing is voluntarily produced for officers by the wife of a defendant, the visual evidence (seeing the clothing) and the physical evidence (the clothing itself) is admissible.

"[T]he evidence supports the conclusion that . . . [defendant's wife] freely consented to their entering the living room to question her about defendant's activities What evidence they gained from their conversation and observation was therefore admissible. Moreover, the evidence that . . . [defendant's wife] freely cooperated with the officers on this visit, produced the trousers when she was requested to do so, and consented to the subsequent taking of the shirt, supports the trial court's conclusion that she also consented to . . . [the] taking [of] the trousers" Ibid.

Mrs. Chavez consented to the entry of the officers (HCT 737, 748, 847) and to the search which resulted in discovery of the jacket. The testimony concerning the discovery is in conflict. Mrs. Chavez stated that the officers asked permission to look in the closet and then did so (HCT 717, 721-25, 749-52, 757-59). Officer Sluder testified that, after being asked if she would show them the jacket, Mrs. Chavez went to the closet and brought the jacket to the officers, replacing it in the closet later (HCT 854-56). Hence, under either version of the facts, the search was consensual.

Though the search was made when the officers sighted the incriminating jacket, the seizure was accomplished when Chavez arrived home and was asked to get it. Because the search was proper, so too was the seizure. Chavez was arrested for committing the felonies of arson and murder. It is axiomatic that evidence in the control of the person arrested may be seized at the time of arrest. People v. Winston, 46 Cal.2d 151, 162, 293 P.2d 40, 46-47 (1956).

C. Counsel's Restraint In Refraining
From Making Frivolous Objections
Was Not Incompetence.

The restraint of the trial attorneys is indicative of professional ability rather than incompetence.

"Defense counsel is to be complimented for remembering that he who often objects, only to have his objections over-ruled, risks alienating the jury even if he does not test the patience of the presiding judge." Williams v. Beto, 354 F.2d 698, 703 (5th Cir. 1965).

Whether a state prisoner has been denied due process of law by reason of incompetent counsel -- particularly when that counsel is privately retained -- must rest not on whether an objection is made to one or two items of evidence but on a complete evaluation of the trial record.

"Assuming that counsel erred . . . in failing to object to the admission of evidence, more is required to constitute denial of the effective assistance of counsel guaranteed by the Six Amendment." Rivera v. United States, 318 F.2d 606, 608 (9th Cir. 1963); Cf., Bouchard v. United States, 344 F.2d 872, 874-75 (9th Cir. 1965).

In evaluating the foundation for appellants' charges, it must be remembered that it is only a gross degree of incompetence which warrants a finding that a defendant has been denied the effective assistance of counsel.

"One who asserts that his attorney did not provide legal representation adequate to meet the requirements of the Sixth Amendment has a heavy burden to sustain. This court has repeatedly held that it is . . . necessary to show that counsel was 'so incompetent or inefficient as to make the trial a farce or mockery of justice.'" Reid v. United States, 334 F.2d 915, 919 (9th Cir. 1964).

The right to counsel does not mean perfect counsel or counsel who, upon hindsight judgment, can be found without error, but counsel which has rendered reasonably effective assistance. Pineda v. Bailey, 340 F.2d 162, 164 (5th Cir. 1965). Competency must be judged in the light of the entire trial record, and it is not determined by an absence of technical flyspecks when examined with the magnification of hindsight.

"[E]rrors [in judgment], even if they indicate a lack of skill, do not vitiate the trial, unless on the whole the representation was of such a low caliber as to amount to no representation and to reduce the trial to a farce." Lyons v. United States, 325 F.2d 370, 377 (9th Cir.), cert. denied, 377 U.S. 969, 84 S. Ct. 1650 (1964).

The district judge heard evidence and carefully examined the lengthy trial transcript before making his evaluation of the quality of trial counsel. His findings are as follows:

"At the time of the evidentiary hearing no affirmative showing was made, nor was any evidence adduced or otherwise produced, regarding the asserted inadequacy of counsel. Suffice, that the lengthy trial record has been carefully examined and reflects affirmatively that at all stages counsel representing the petitioners exercised that degree of competence which would effectively negative any claim or contention that the petitioners were not accorded a fair trial as contemplated by

the due process clause. This was no pro forma defense for either petitioner. The prosecution witnesses were carefully cross-examined and a theory of defense was presented to the jury which found them guilty. There was ample evidence to support the verdict of the jury." (CT 371)

"[D]enial of effective . . . assistance of counsel occurs only when performance by counsel is so incompetent that the trial becomes a farce or mockery of justice . . ., [and] this Court concludes that the instant petition certainly falls short of the mark." (CT 372)

This finding is amply supported by the evidence adduced at the habeas corpus hearings and thoroughly refutes the appellants' contentions.

II

THE USE OF THE HERNANDEZ ADMISSION AND THE JOINT STATEMENT DID NOT DEPRIVE APPELLANTS OF DUE PROCESS

Appellants claim that they suffered deprivation of due process through the evidential use of "accusatory statements" made by Hernandez

(AOB 12-13). The exact nature of the complaint, however, is not clear, since the argument confuses both the facts and the characters.

Before proceeding further, then, it is necessary to make two observations. (1) The trial involved the use of two separate statements. (2) In each case, the jury was instructed that the evidence was to be considered only for limited purposes.

The first Hernandez statement was made on April 7, 1957. It was in the nature of an admission and was so proffered (TT 1403-04) and received (TT 1406). This admission was the first statement used at trial. For purposes of clarity, it will hereinafter be referred to as "the Hernandez admission."

The conversation constituting the admission was tape recorded and a transcript thereof was made. Sergeant Tidyman read the transcript aloud to the jury. But before this evidence was given, the trial judge admonished the jury as follows:

"This evidence you are about to receive now is to be received by you solely with regard to defendant Hernandez. You are not to use it in any way in regard to defendant Bates or Chavez." (TT 1433)

During the conversation, Hernandez related the events surrounding the crime (the fight, the gas purchase, the fire, and the escape), to include both his role and those of Brenhaug, Bates, and Chavez (see TT 1432-51).

The second statement, made on April 9, 1957, is better denominated the "joint statement," since it included the declarations of Brenhaug, Bates, Chavez, and Hernandez. The four men were brought together in a room and there, in the presence of each other, each was asked to tell his version of the facts. As with the Hernandez admission, the joint statement was recorded and a transcript thereof read to the jury by Sergeant Tidyman. But before the evidence was admitted, the court again gave limiting instructions.

"In this instance the Court has been informed that the defendant Chavez has denied all of the accusatory statements which were made as to him, and so in receiving this evidence it will not be received in any way in regard to the defendant Chavez." (TT 1473)

"The Court again repeats that you are not to receive any of this testimony pertaining to the defendant Chavez." (TT 1474)

The prosecutor was willing to omit any references to Chavez contained in the joint statement (TT 1456-57) but counsel

for Chavez was not.

"I feel that if the transcription is read, it should be read in its entirety, including the statements by Mr. Chavez, facing Mr. Brenhaug and Mr. Hernandez and Bates and the officers, and saying that this is a complete lie, that they're lying through their teeth." (TT 1460; see also TT 1407, 1457-58, 1461)

The joint statement was admitted against Bates only as an accusatory statement, that is, the jury was instructed that unless the conduct of Bates indicated an admission, the conversation should be entirely disregarded:

"The Court will instruct you in regard to an accusatory statement that if you should find from the evidence that there was an occasion when the defendant, or in this case any of the defendants other than Chavez, under conditions which fairly afforded him an opportunity to reply, failed to make denial, or made false, evasive or contradictory statements in the face of an accusation, expressed directly to him or in his presence, charging him with the crime for which he now is on

trial or tending to connect him with its commission, and if you should find that he heard the accusation and understood its nature, such silence and/or conduct on his part may be considered against him as indicating an admission that the accusation thus made was true. Evidence of such an accusatory statement is not received for the purpose of proving its truth, but only to explain the conduct of the accused in the face of it; and unless you should find that his conduct at the time indicated an admission that the accusatory statement was true, you should entirely disregard the statement." (TT 1473-74) (Emphasis added.)

This instruction was repeated in the final charge to the jury (CTT 94).

In the joint statement, Brenhaug gave a detailed description of events. Hernandez embellished the Brenhaug statement and offered corrections where he felt Brenhaug was in error. Bates disclaimed any knowledge of facts germane to the crime, asserting that he could remember nothing. Chavez declined any comment other than denying guilt. (See TT 1475-512).

Appellants' argument (AOB 12-15) confuses both the facts and the characters in regard to the statements admitted at trial. The distinctions between the two separate statements, and the limited purposes for which the evidence was admitted, must be kept in mind while analyzing the issues.

A. The Johnson Case Precludes An Examination Of The Question Of Whether Either Appellants Or Hernandez Were Advised of Their Constitutional Rights and Waived Those Rights.

Appellants assert that Johnson v. New Jersey, 384 U.S. 719, 86 S. Ct. 1772 (1966), "does not preclude examination into the voluntariness of the statements used against criminal defendants" (AOB 11). But appellants misconstrue the ruling below wherein Johnson was held determinative only of certain issues.

In his "supplemental petition," appellant Bates contended that statements were taken from the parties accused "while . . . in custody . . . and without having been advised of their legal rights . . ." (CT 87-88). In his "amended petition," appellant Chavez claimed that "subsequent to the arrest of petitioner and . . . the other defendants, . . . all were kept in custody without having been advised of their legal rights . . ."

(CT 106). In his order of February 24, 1964, Judge Carter concluded that appellants' petitions were founded upon the use made of statements which had been taken while the parties accused were held in police custody but had not been advised of their rights (CT 307). Bates v. Dickson, 226 F.Supp. 983, 992 (N.D. Cal. 1964). The same basis for the assertions made in the petitions was also noted in the joint pre-trial order of May 5, 1964 (CT 328, 331, 333). Thus it is clear that throughout these proceedings petitioners have urged that any statements or admissions received in evidence were inadmissible because the declarants had not been advised of their rights of silence and to counsel.

Conspicuously absent from the petitions are allegations of brutality and coercion. Petitioners did, however, raise the innuendo of coercion by two allegations. First, it was claimed that Hernandez had been threatened with the gas chamber unless he cooperated (CT 331). Secondly, Chavez claimed that he was both threatened with the gas chamber and handcuffed to a chair during a long period of interrogation (CT 333).*

*According to the pre-trial order, it was Bates who made these allegations (CT 333). The testimony given to support these charges during the habeas corpus hearings was all related by Chavez (HC 886, 888-89).

Bates made no complaints whatever. Though testimony to this effect was elicited from Hernandez (HCT34-35, 39-40, 68-70, 86-87, 91) and Chavez (HCT886, 888-89), the interrogating officers denied both threats and physical abuse (as to Hernandez, HCT604, 607-12, 621-22, 660, 665-68, 809-10, 824, 825, 832; as to Chavez, HCT946, 956, 1012, 1020-21, 1025-26). The finding of the court below was, "There were no coerced confessions or admissions." (CT 371)

The court below ruled that "the subsequent holding of Johnson . . . forecloses inquiry into the claimed illegal accusatory statements." (CT 370)

This holding was the necessary consequence of the finding that "there were no coerced confessions or admission," leaving only the petitioners' claims that they had not been properly apprised of their rights as the foundation of their allegations. Johnson does preclude inquiry into this only remaining basis for their claims, since appellants were tried in 1957, almost nine years before Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (June 13, 1966). Johnson v. New Jersey, 384 U.S. 719, 86 S. Ct. 1772 (1966).

B. The Reading Of Neither The Hernandez Admission Nor The Joint Statement Prejudiced Either Bates or Chavez.

The gravamen of appellants' attack upon the admissibility of the Hernandez admission and the joint statement is the allegation that they were involuntary. This question can be reached, however, only in the event that appellants can show that the evidence in question was used against them. This prerequisite can not be met.

1. The Hernandez admission was not received against either Bates or Chavez.

It has been held that the Hernandez statement of April 6 was properly admitted against Hernandez, with adequate instructions limiting the evidence to him only, and that neither appellant can complain that he might have been prejudiced thereby. Chavez v. Dickson, 280 F.2d 727, 736 (9th Cir. 1960); People v. Chavez, 50 Cal.2d 778, 790, 329 P.2d 907, 915 (1958).

"The fact that certain evidence is prejudicial is immaterial if in fact it was admissible. No federal question of fact or law was raised as to the reading of Hernandez' statement." Chavez v.

Dickson, supra, 280 F.2d at 736.

2. The joint statement was not received against Chavez.

It has also been held that appellant Chavez was not prejudiced by admission of the joint statement. Chavez v. Dickson, supra, 280 F.2d at 736; People v. Chavez, supra, 50 Cal.2d at 791, 329 P.2d at 915.

"The California Supreme Court held that the statement was properly admitted as to Hernandez and that as to Chavez a proper cautionary instruction had been given. It follows that as to Chavez the reading of the Brenhaug statement presents no federal question of fact or law. Accordingly, as to him we reach the same conclusion as stated above with respect to the Hernandez statement." Chavez v. Dickson, supra, 280 F.2d at 736.

3. The joint statement was admitted against Bates, only insofar as his own conduct manifested an admission, but the use thereof did not constitute federal error.

As to appellant Bates, it has been held that part of the joint statement was properly admitted against him, while part of it was inadmissible under state law. People v. Chavez,

supra, 50 Cal.2d at 791-92, 329 P.2d at 915-16. However, the error was found to be harmless. Ibid. The admission of the joint statement, though later determined erroneous based upon state grounds, did not constitute federal error. Chavez v. Dickson, 280 F.2d 727, 737 (9th Cir. 1960).

"[I]t is our view that the reading of that statement, which was error in so far as Bates is concerned, was not so prejudicial as to constitute a denial of fundamental fairness essential to the concept of justice." Ibid.

4. It is not federal constitutional error to receive a confession or admission of one defendant in a joint trial, even though the confession or admission implicates his codefendants, when the jury is given limiting instructions.

Before the Hernandez admission was received as evidence, the trial judge admonished the jury that the admission could not be considered in any way in regard to either Bates or Chavez" (TT 1433).

Before the joint statement was admitted, the trial court again gave similar instructions.

The jury was not to consider any of the statements in respect to Chavez (TT 1473-74). In regard to Bates and the other defendants, the jury was carefully instructed on the nature of accusatory statements and that unless the conduct of the particular defendants indicated an admission that the accusatory statement was true, the entire statement should be disregarded (TT 1474). The trial court also pointed out that it was not the statement which might possibly be received as evidence, but "the conduct of the accused in the face of it" (TT 1474).

In Delli Paoli v. United States, 352 U.S. 232, 77 S. Ct. 294 (1956), there was a conspiracy of five persons of whom only Whitley confessed. This confession, without any deletions of the names of the non-confessing codefendants, was admitted under the instruction that it was limited to Whitley. The United States Supreme Court observed that a confession of one codefendant is admissible against him under appropriate limiting instructions. Id., 352 U.S. at 237, 77 S. Ct. at 297.

"[P]ossible prejudice against other defendants may be overcome by clear instructions limiting the jury's consideration of a . . . declaration solely to the determination of the guilt of the declarant" Id., n. 5, 352 U.S. at 239, 77 S. Ct. at 299.

The limiting instructions in Delli Paoli (352 U.S. at 239-40, 77 S. Ct. at 299) were strikingly similar to those given during appellants' trial (TT 1433, 1473-74; CT 98). The Delli Paoli decision suggested that such instructions must be presumed as followed, obviating prejudice, where: (a) the crime was not complex; (b) the interests of the codefendants were separately protected by separate counsel; (c) the confession was corroborated by ample facts, and was cumulative of facts already produced at trial; and (d) there is nothing in the record to suggest that the jury was confused and failed to follow instructions. Id., 352 U.S. at 241-42, 77 S. Ct. at 299-300. The circumstances assuring that the instructions were followed in Delli Paoli are on all fours with the circumstances herein.

The Delli Paoli case continues to be cited for the proposition that prejudice against codefendants is precluded when evidence admissible only against one is

limited to that single defendant. See Spencer v. Texas, 385 U.S. 554, 562, 87 S. Ct. 648, 653 (1967); Wong Sun v. United States, 371 U.S. 471, 489, 83 S. Ct. 407, 419 (1963). In its most recent opportunity to reconsider the Delli Paoli case, and to instead adopt the principle established in People v. Aranda, 63 Cal.2d 518 407 P.2d 265 (1965), the United States Supreme Court has declined to do so. Gilbert v. California, ___ U.S. ___, 35 U.S.L.W. 4614, 4615-16 (June 12, 1967). The Delli Paoli rule is controlling here and appellants cannot claim prejudice since the evidence complained of was not admitted against them.

Appellants urge that the efficacy of limiting instructions is a "fiction" which is being "steadily rejected" (AOB 20-21). In support of this novel proposition, appellants cite but two cases: Delli Paoli v. United States, 352 U.S. 232, 77 S. Ct. 294 (1956); and People v. Aranda, 63 Cal.2d 518, 407 P.2d 265 (1965). Appellants conveniently ignore Spencer v. Texas, 385 U.S. 554, 562, 87 S. Ct. 648, 653 (1967), however, which discusses at length the effectiveness of such instructions in precisely the situation of which appellants complain. Nor does Aranda purport to base its holding upon any constitutional principles. Instead, the Aranda decision was deemed necessary to effectuate a section of the

California Penal Code.

"In the absence, however, of a holding by the United States Supreme Court that the due process clause requires such change, the rules we now adopt are to be regarded, not as constitutionally compelled, but as judicially declared rules of practice to implement section 1098." People v. Aranda, supra, 63 Cal.2d at 530, 407 P.2d 272.

That Aranda is but a "judicially declared rule of practice" is further supported by the refusal of the California Supreme Court to give it retroactive application. "The purposes of Aranda do not require its application to convictions long since final." People v. Charles, 66 A.C. 325, 328, ___ P.2d ___, ___ (1967).

C. The Claim That Hernandez Was Coerced Does Not Result In Federal Constitutional Error As to Bates and Chavez.

The basis of appellants' claim is that the Hernandez admission and his participation in the joint statement were the product of coercion. Claims of coercion launched against the Hernandez admission and his participation in the joint statement are of dubious applicability to appellants. Neither the admission nor the joint statement was admitted against Chavez (TT 1433, 1473-74). The

admission was not received against Bates (TT 1433), nor was the Hernandez participation in the joint statement admitted against him (TT 1474). In reference to the joint statement, the only thing admitted against Bates was his evasive or equivocal conduct, and not the substance of anything Hernandez said (TT 1474). Bates himself did not claim, through his testimony at the 1964 hearing (HCT 970-1000), that his own participation in the joint statement was the product of coercion. Assuming, contrary to both the evidence and the findings of the district judge, that Hernandez was coerced, appellants cannot trade in his constitutional rights for their benefit.

In Malinski v. New York, 324 U.S. 401, 65 S. Ct. 781 (1945), three persons were convicted of a murder committed in the course of a robbery. Malinski confessed to the crime under circumstances held to be coercive. Id., 324 U.S. at 405-10, 65 S. Ct. at 783-86. His codefendant, Rudish, did not. The Supreme Court was "asked to reverse as to Rudish because the confession . . . which was introduced in evidence against Malinski was prejudicial to Rudish." Id., 324 U.S. at 410-11, 65 S. Ct. at 786. But the Court refused, basing its decision on the following factors: (a) though

a coerced confession of one codefendant may permit reversal as to all codefendants in a federal trial, in state trials the effect of a reversal as to one is to be determined only by state procedure; (b) the jury was instructed that the confession was admissible against Malinski alone; and (c) there was substantial evidence to sustain the convictions exclusive of the confession. Id., 324 U.S. at 411-12, 65 S. Ct. at 786-87.

The Malinski decision was also based upon the fact that the names of the nonconfessing defendants were deleted. In Stein v. New York, 346 U.S. 156, 194, 73 S. Ct. 1077, 1098 (1953), however, the Malinski deletion was considered unimportant. That deletion of the codefendants' names is not required is also suggested by Delli Paoli v. United States, 352 U.S. 232, 77 S. Ct. 294 (1956).

In Stein v. New York, 346 U.S. 156, 73 S. Ct. 1077 (1953), three defendants were tried for felony murder. Two of the defendants later confessed, but Wissner did not.

"Wissner never confessed, but he was implicated by those who did. His objections raise questions of admissibility of the

confessions to which he was not a party.

"However, we find as regards Wissner no constitutional error such as would justify our setting aside his conviction.

". . . [E]ven if the confessions were considered to have been involuntary, their use would not have violated any federal right of Wissner's . . . [citing Malinski]." Id., 346 U.S. at 194, 73 S. Ct. at 1097.

The Stein case bases its conclusion that no constitutional issue is raised when a confession implicating a non-confessing codefendant is admitted, where the confession was limited in admissibility, upon the Malinski decision. Other facets of the Stein decision have, of course, been overruled in part by two later decisions. In Jackson v. Denno, 378 U.S. 368, 391, 84 S. Ct. 1774, 1788 (1963), Stein was overruled insofar as it approved the New York court procedure concerning the admission of confessions into evidence when voluntariness has been placed in issue. In Pointer v. Texas, 380 U.S. 400, 406, 85 S. Ct. 1065, 1069 (1965), Stein was overruled insofar as it stated that the Sixth Amendment did not apply to the states. In neither of these cases, however, was the holding on the codefendant's inability to invoke the constitutional protections afforded another overruled or

questioned.

It is clear that Stein has not been overruled on this point. Jackson v. Denno, 378 U.S. 368, 376, 84 S. Ct. 1774, 1780 (1963), which overrules Stein in part, cites Malinski approvingly though for a different proposition. The Malinski holding, and its descendant in Stein, are still determinative. Jones v. United States, 342 F.2d 863, 867 (D.C. Cir. 1964).

The holdings in Malinski and Stein are also supported by logic. As Delli Paoli so clearly stated, where instructions are given to the jury, admonishing them that certain evidence is not to be considered against several of the defendants, then it must be presumed that the jury followed these instructions. Delli Paoli v. United States, 352 U.S. 232, n. 5 at 239, 241-42, 77 S. Ct. 294, n. 5 at 299, 299-300 (1956).

D. Hernandez was not coerced.

Appellants claim that Hernandez was psychologically coerced into confessing and implicating them in the joint statement (AOB 12-15). Appellants' recitation of the purported facts in support of this assertion, however, reflects a misapprehension of the record (AOB 13).

At the time of his arrest, Hernandez was 18 years old. When first interviewed by Sergeants Tidyman

and Little on April 6, 1957, Hernandez related in substance the events later repeated in his recorded admission and the joint statement (HCT 603-07, 611). This interview was made before Hernandez had been apprised of Brenhaug's statements (HCT 608, 809-10, 824), and his initial admissions were made in the first interview after he was arrested (see HCT 602-03, 1021, 1028).

During all of the interviews (unrecorded interview of April 6, recorded admission of April 7, and recorded joint statement of April 9), Hernandez was very cooperative (HCT 620-21, 659-60, 837). He volunteered information and never refused to answer any questions asked (HCT 668). The interrogating officers did not threaten him, did not mention the death penalty or the gas chamber, did not promise immunity or leniency, and did not offer to release him if he corroborated Brenhaug (HCT 621-22, 660, 665-68, 825, 832-33).

Appellants' recitation of the "facts" (AOB 13) appears to be based solely upon the testimony of Hernandez during the 1964 hearings, and totally ignores the testimony of the interrogating officers summarized above. The court below found that "there were no coerced

confessions or admissions" (CT 371). This finding of fact is amply supported by the record and refutes the allegation of "psychological coercion."

To bolster their argument, appellants have cited a number of inapposite cases (AOB 14-15). Hernandez was 18, and not of tender years. See Gallegos v. Colorado, 370 U.S. 49, 82 S. Ct. 1167 (1962); Haley v. Ohio, 332 U.S. 596, 68 S. Ct. 302 (1948). He was not told he would be held incommunicado until he confessed. See Haynes v. Washington, 373 U.S. 503, 83 S. Ct. 1336 (1963); Ledbetter v. Warden, Maryland Penitentiary, 368 F.2d 490 (4th Cir. 1966), cert denied, ___ U.S. ___, 87 S. Ct. 1162 (1967); United States ex rel. Williams v. Fay, 323 F.2d 65 (2d Cir. 1963), cert. denied, 376 U.S. 915, 84 S. Ct. 667 (1964). He was not confronted with a situation contrived to subvert his will through his emotions. See Culombe v. Connecticut, 367 U.S. 568, 81 S. Ct. 1860 (1960); Lynum v. Illinois, 372 U.S. 528, 83 S. Ct. 917 (1963); United States ex rel. Williams v. Fay, supra, 323 F.2d 65. He was neither illiterate nor mentally defective. See Culombe v. Connecticut, supra, 367 U.S. 568, 81 S. Ct. 1860. To the contrary, Hernandez volunteered information and freely cooperated with the

investigating officers. Hernandez made no claim that he was held incommunicado. Unlike all of the cases cited by appellants, with the exception of Gallegos, Hernandez never denied complicity in the crime. In Gallegos, the accused was only 14 and freely confessed to a robbery which later ripened into murder through the subsequent death of the victim. Hernandez was much older and more experienced, and it cannot be said that at the time he admitted his participation he was not aware that a murder charge could be brought against him.

Crucial to the issue of coercion is the question of time. Hernandez never claimed that he had been subjected to the grueling pressure of relentless interrogation over an extended period of time. Nor could this claim be made, for the facts clearly show that shortly after his initial interrogation, Hernandez made the first of his admissions and volunteered a detailed description of events, the substance of which did not vary in his subsequent recorded admission and the joint statement. Hernandez was arrested at 3:20 am. on April 6, 1957 (HCT 602). He was interviewed for the first time at 8:00 that same morning (HCT 603). This was the first time he was interviewed by anyone, since

only Sergeants Tidyman and Little were allowed to interrogate the suspects (HCT 1021, 1028). It was in this initial interview that Hernandez volunteered his first, detailed admission (HCT 603-08, 611).

The court below, in rejecting the version of the facts offered by Hernandez, found that the Hernandez statements and admissions were not psychologically coerced (see CT 371). This finding is amply supported by the record.

III

APPELLANTS WERE NOT DENIED THE OPPORTUNITY TO CROSS- EXAMINE A WITNESS AGAINST THEM

Appellants claim that they were denied an opportunity to confront and cross-examine Hernandez, citing Pointer v. Texas, 380 U.S. 400, 85 S. Ct. 1065 (1965), and Douglas v. Alabama, 380 U.S. 415, 85 S. Ct. 1074 (1965)(AOB 16-20). They do not bother to mention that Hernandez was not a witness against them.

Hernandez did not testify. His admission was received only against himself and was not received against either Chavez or Bates. The joint statement was not admitted against Chavez, and insofar as Bates was concerned, the joint statement was admitted only to the degree that Bates' conduct in the face of such a

statement manifested an admission of the truth thereof. The admissibility of declarations of a codefendant, with limiting instructions, must be determined in accord with the principles defined in Delli Paoli v. United States, 352 U.S. 232, 239, 77 S. Ct. 294, 299 (1956), and discussed earlier. Pointer and Douglas are absolutely immaterial.

Finally, in both Pointer and Douglas, trial counsel objected to the introduction of evidence on the grounds that confrontation was wanting. Pointer v. Texas, supra, 380 U.S. at 401-02, 85 S. Ct. at 1067; Douglas v. Alabama, supra, 380 U.S. at 420-23, 85 S. Ct. at 1078-79. No such objection was made by appellants at trial and hence the question was not preserved. See Nelson v. California, 346 F.2d 73, 77-82 (9th Cir.), cert. denied, 382 U.S. 964, 86 S. Ct. 452 (1965). Nor was any such contention made in the district court.

IV

APPLICATION OF CALIFORNIA'S HARMLESS-ERROR RULE DOES NOT RAISE A FEDERAL QUESTION

Appellants' argument challenging application of California's harmless-error rule confuses the holding in People v. Chavez, 50 Cal.2d 778, 329 P.2d 907 (1958),

cert. denied, Chavez v. California, 358 U.S. 946, 79 S. Ct. 356 (1959), and Bates v. California, 359 U.S. 993, 79 S. Ct. 1126 (1959). The California Supreme Court ruled that there was no error as to either Bates or Chavez in the use of the Hernandez admission, and that there was no error as to Chavez in the admission of the joint statement. Id., 50 Cal.2d at 790-91, 329 P.2d 914-15. The California harmless-error rule was applied only to the admission of the joint statement against Bates. Id., 50 Cal. 2d at 791-92, 329 P.2d at 915-16.

"With respect to Bates it is clear that part of the conversation was admissible in view of the fact that he said he remembered going to the Mecca with Brenhaug, Chavez, and Hernandez, that they had a "beef" there, and that he was with Chavez and Hernandez at the Corner Café about closing time. As to the remainder of the conversation, he insisted that he did not remember, and while he did not expressly say so, it seems obvious that his position was that he was unable to remember because he was intoxicated. Under the circumstances his asserted failure to remember cannot

properly be taken as an evasive or equivocal response indicating consciousness of guilt or acquiescence in the truth of Brenhaug's account, and it follows that the conversation was erroneously admitted as to Bates We are satisfied, however, that the error does not require a reversal At the trial Brenhaug took the stand and testified to substantially the same facts as were set forth in the conversation, and he was subjected to lengthy cross-examination. This testimony, together with other evidence, amply established the case against Bates, irrespective of the erroneously admitted conversation. Indeed, Bates' position at the trial was not based on a denial of what happened on the night of April 4 but on the claim that he did not remember and that he was so intoxicated as to be guiltless of the crimes charged, a claim which the jury rejected Moreover, in receiving the conversation [TT 1473-74] and, again, in giving formal instructions to the jury [CTT 94], the court made clear that, unless the conduct of Bates indicated an admission, the conversation should be entirely disregarded, and it is

highly unlikely that Bates' response that he did not remember would have been viewed by the jury as an admission." Ibid.

The propriety of California's application of its harmless-error rule has been the subject of prior federal adjudication. Chavez v. Dickson, 280 F.2d 727, 737 (1960), cert. denied, 364 U.S. 934, 81 S. Ct. 379 (1961).

"[I]t is our view that the reading of that statement, which was error in so far as Bates is concerned, was not so prejudicial as to constitute a denial of fundamental fairness essential to the concept of justice." Ibid.

The California Supreme Court held that part of the joint statement was inadmissible against Bates, but only because it was not an accusatory statement. This, then, was wholly a question of the admissibility of evidence under state rules. "The application of a state harmless-error rule is, of course, a state question where it involves only errors of state procedure or state law." Chapman v. California, 386 U.S. 18, 21, 87 S. Ct. 824, 826 (1967).

It is arguable that the question of the admissibility of accusatory statements has been absorbed

into the realm of the Federal Constitution and can no longer be determined solely by state rules. See Miranda v. Arizona, n. 37, 384 U.S. 436, 468, 86 S. Ct. 1602, 1624-25 (1966); Developments in the Law -- Confessions, 79 Harv. L. Rev. 935, 1042-43 (1966). But if this is the case, then the federal constitutional character of such statements was only recently created by the decisions in Miranda v. Arizona, supra, n. 37, 384 U.S. at 468, 86 S. Ct. at 1624-25, Griffin v. California, 380 U.S. 609, 85 S. Ct. 1220 (1965), Escobedo v. Illinois, 378 U.S. 478, 84 S. Ct. 1758 (1964). Ibid. And since none of those cases have been held retroactive, the admissibility of accusatory statements in a 1957 trial is not an issue of federal constitutional dimensions. Johnson v. New Jersey, 384 U.S. 719, 86 S. Ct. 1772 (1966); Tehan v. Schott, 382 U.S. 406, 86 S. Ct. 459 (1966). Thus the state law controlled both the question of the existence of error and that of the harmlessness thereof.

Finally, since it clearly appears that the propriety of the application of California's harmless-error rule was not raised below, it cannot now be questioned for the first time.

TRIAL COUNSEL ADEQUATELY
PRESENTED APPELLANT BATES'
DEFENSE OF DIMINISHED
RESPONSIBILITY

Appellant Bates asserts that his trial counsel failed to adequately present the defense of "diminished responsibility" in that he chose not to call a number of witnesses to attest to Bates' "mental blackouts" when under the influence of alcohol (AOB 25-26). This defense was adequately presented to the jury.

The claim that trial counsel did not adequately present Bates' defense that he was intoxicated to the point of unconsciousness during the crime lacks factual support. The court below found that trial counsel had made more than adequate efforts to present such evidence.

"The trial record in Bates literally reeks with the odor of alcohol. Counsel for Bates . . . diligently pursued the question of intoxication by cross-examination of the prosecution witnesses as well as by testimony of defense witnesses

"Counsel fully and forcefully argued the question of intoxication as it related to specific intent. His argument covered eighty pages in the transcript . . . and the greater

portion of it was devoted to the evaluation of the evidence on intoxication, and its relation to the intent of the defendant. Counsel for the other defendants also fully argued the question of intoxication. One cannot read this record without the impression that the issue of the capacity of Bates to form the necessary specific intent required to support a conviction of murder was vigorously, fully and fairly presented to the jury." (CT 301-02) Bates v. Dickson, 226 F.Supp. 983, 988-89 (N.D. Cal. 1964).

Appellant Bates cannot predicate his claim of incompetent counsel upon the decision of trial counsel not to call certain witnesses whom appellant Bates considered essential to his defense. Hensley v. United States, 281 F.2d 605, 609 (D.C. Cir. 1960). Whether or not to call certain witnesses is a decision to be made according to the attorney's judgment and cannot be relied upon as the basis for a claim of incompetent counsel. Tompa v. Virginia, 331 F.2d 552, 554 (4th Cir. 1964).

VI

APPELLANT BATES WAS NOT DEPRIVED OF DUE PROCESS WHEN HIS PRIOR CONVICTIONS WERE MENTIONED

Appellant Bates contends that he was deprived of due process through the use made at trial of his prior convictions (AOB 26-28). Testimony concerning the prior convictions was elicited from Bates by his own counsel on direct examination (TT 1865-67). Thus any error was invited, if not created, by Bates and he cannot now complain.

A. The Restriction Of Bates' Explanation Of His Prior Convictions Was Neither Prejudicial Nor Erroneous.

Bates complains that when testifying, "he was not premitted to say that . . . two of them . . . were juvenile, not felony convictions, and that . . . the other two . . . resulted from guilty pleas coerced from him when he was denied the assistance of counsel, contrary to the rules laid down in Gideon v. Wainwright" (AOB 26-27).

The claim that several of the convictions were juvenile convictions is subject to the direct contradiction of the record. According to the Clerk's Transcript at trial (1957), the prior convictions were:

"Violation of the Dyer Act, a felony" (1937); "Violation of the Dyer Act, a felony" (1939); "Attempt to Escape From United States Prison, a felony" (1940); and "Burglary and Grand Larceny, a felony" (1947). (CTT 9) Bates has never offered any proof in support of his present allegations which might serve to refute the convictions appearing as a matter of record.

Bates also contends that in two of these convictions he was denied counsel contrary to Gideon. The reliance on Gideon is inappropriate since the Gideon case extended the Sixth Amendment right to counsel to the states. Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792 (1963). In only one of the prior convictions was Bates tried in a state court (Tennessee in 1947). At the time he was tried, Tennessee accorded the right to appointed counsel as was later developed in Gideon. See Betts v. Brady, Appendix I (A), 316 U.S. 455, 478, 62 S. Ct. 1252, 1264 (1942).

In the last two of his federal convictions (those of 1939 and 1940), Bates was also afforded the right to appointed counsel. See Bute v. Illinois, 333 U.S. 640, 661, 68 S. Ct. 763, 774 (1948). As to the 1937 federal conviction, Bates has not at any time attempted to raise the legality of that conviction by any of the means of collateral attack available.

Certainly the 1957 trial -- which was near completion before Bates allegedly sought to challenge his prior convictions -- was not the proper forum for raising such an issue and appellant Bates cannot predicate error thereon.

B. The Instructions, Limiting The Use To Be Made Of The Prior Convictions, Precluded Prejudice.

Appellant Bates claims that the limiting instructions were ineffective and could not have precluded prejudice (AOB 27-28). But in the absence of convincing proof to the contrary, it cannot be assumed that the jury failed to heed instructions given it. Delli Paoli v. United States, 352 U.S. 232, 242, 77 S. Ct. 294, 300 (1957). Bates cannot claim that the jury failed to follow instructions in regard to the limited admissibility of the prior convictions since he has failed to sustain his burden of showing that the instructions were ignored. The instructions clearly required the jury to make a finding on the issue of guilty before any decision was made as to the existence of prior convictions (CTT 108). It seems difficult to support a charge of prejudice based on prior convictions where the jury could not have considered them until they had already found Bates guilty.

A similar contention -- that a defendant is prejudiced by evidence of prior convictions despite limiting instructions -- has been rejected by the United States Supreme Court. Spencer v. Texas, 385 U.S. 554, 87 S. Ct. 648 (1967).

C. Failure To Object Precludes Bates From Now Complaining That He Was "Forced" To Admit The Prior Convictions.

Appellant now complains that "the evidence . . . [was] forced by the Court out of the mouth of the appellant" (AOB 28) But when the trial court "forced" Bates to admit the prior convictions, no objection was made. Lack of contemporaneous objection precludes him from raising the issue now. See Nelson v. California, 346 F.2d 73, 77-82 (9th Cir.), cert. denied, 382 U.S. 964, 86 S. Ct. 452 (1965).

D. Bates Cannot Attack The Constitutionality Of The Prior Convictions On The Grounds Established By Arketa.

Appellant lastly asserts that he can now attack the constitutionality of prior convictions under the rule announced in Arketa v. Wilson, 373 F.2d 582 (9th Cir. 1967) (AOB 28). The holding in Arketa demonstrates its inapplicability to the case herein:

"[W]here the effect of a prior sentence is to deprive the trial judge of the option that he would otherwise have to grant probation, a prisoner should be able, in federal habeas corpus, to attack the validity of the prior convictions on federal constitutional grounds."

Id., at 585.

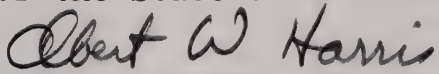
Appellant Bates was convicted of murder, a crime which did not permit probation. Hence the Arketa rule is unavailable to him.

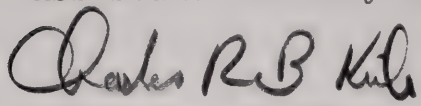
CONCLUSION

It is respectfully submitted that the order denying the petitions for writs of habeas corpus be affirmed.

Dated: June 20, 1967.

THOMAS C. LYNCH, Attorney General
of the State of California


ALBERT W. HARRIS, JR.
Assistant Attorney General


CHARLES R. B. KIRK
Deputy Attorney General

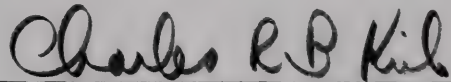
Attorneys for Respondent.

CRBK:ck

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

Dated: June 20, 1967.

A handwritten signature in cursive script, reading "Charles R.B. Kirk". The signature is written in dark ink and is positioned above a horizontal line.

CHARLES R.B. KIRK
Deputy Attorney General

CRBK:ck

A P P E N D I X

EXHIBIT A

Executive Department

State of California

COMMUTATION OF SENTENCE

CLYDE BATES

747143

Clyde Bates was convicted of the crime of murder in the first degree, 6 counts, on August 16, 1957, by the Los Angeles County Superior Court. On August 22, 1957, he was sentenced to be executed for these crimes in accordance with applicable law. A codefendant, Manuel Joe Chavez, received a similar sentence.

Pursuant to the mandate of Article VII of the California Constitution, I have carefully reviewed this case.

Mr. Bates was received on Condemned Row in San Quentin State Prison on August 29, 1957. Approximately a year later, on September 19, 1958, the convictions of Mr. Bates and his codefendant Chavez were affirmed by the California Supreme Court.

Since that date, Mr. Bates has had three separate execution dates. He was first scheduled to be executed on January 16, 1959, but this execution was stayed by a Justice of the California Supreme Court. Bates was next scheduled to be executed on August 14, 1959, but this execution was stayed by a federal judge. Bates was next scheduled to be executed on February 27, 1963, but this execution was stayed by a federal judge to allow further legal proceedings. This last stay of execution was granted on February 26, 1963, the day before Bates was to be executed. The case has remained pending in the courts since that date.

Almost four years ago I reviewed this case, and I announced at that time that I would not intervene. However, I have now concluded that the execution of Mr. Bates would no longer be in the best interests of justice.

By virtue of the senseless and stupid act of Mr. Bates and his codefendant of throwing gasoline into a crowded bar and then igniting it, six persons lost their lives, and two more were seriously injured. There is no question in my mind of the guilt of Mr. Bates. He was intoxicated at the time, which may explain his senseless crime but certainly does not justify it.

But I can no longer ignore the fact that Mr. Bates has now been confined on Condemned Row in San Quentin State Prison for a period in excess of 9½ years. During this time, he has faced imminent execution on three separate occasions, but each time a court has intervened. The case of Mr. Bates is a living example of what I believe to be the utter futility of capital punishment. If the State cannot carry out a duly entered sentence of execution within 9½ years, then I seriously question the right of the State to carry out the sentence at all. More over, holding a man under sentence of death for almost ten years amounts to de facto, if not de jure, cruel and inhuman punishment.

EXHIBIT A

Executive Department

State of California

PAGE TWO

It is well recognized and widely accepted by every judge, lawyer, law enforcement official and penologist to whom I have ever talked, that if a criminal sanction is really to be effective, justice must be swift and certain. Justice delayed is justice thwarted. This case has now been allowed to drag on through court after court for year after year. No one is to blame; yet all of us concerned with the administration of justice are responsible.

I believe we have now reached a point where this matter must be brought to an end once and for all. So long as this can be done in such a way as to adequately protect society and properly fulfill the ends of justice, I have no hesitancy in taking action.

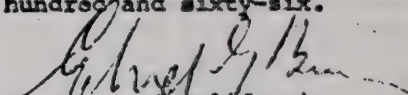
Since Mr. Bates has previously been convicted of felonies, it was necessary to obtain the written recommendation of the majority of the Justices of the Supreme Court of the State of California. I have now received this written recommendation.

The seriousness of Mr. Bates' crime and his subsequent conduct conclusively demonstrate to me that he should probably never again be released from prison. On the other hand, it now is within my power to impose upon him a sentence of life without possibility of parole.

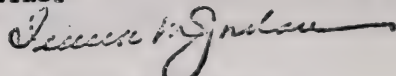
In view of all of the foregoing facts, I have concluded that the interests of justice would best be served in this case by granting to Bates a limited commutation of his present death penalty sentence to one of life without possibility of parole.

NOW, THEREFORE, I, Edmund G. Brown, Governor of the State of California, pursuant to the authority vested in me by the Constitution and statutes of the State of California, do hereby grant to Clyde Bates, Prison No. A-43143, a commutation of sentence from death to life imprisonment without possibility of parole.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of California to be affixed this twenty-second day of December, A.D. nineteen hundred and sixty-six.


Governor of California

ATTEST

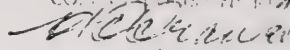

Secretary of State

by 
Deputy Secretary of State



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COPY OF THE ORIGINAL



I have read this
order.

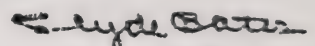

1-6-67

EXHIBIT B

Executive Department

State of California

COMMUTATION OF SENTENCE

MANUEL JOE CHAVEZ

743114

Manuel Joe Chavez was convicted of the crime of murder in the first degree, 6 counts, on August 16, 1957, by the Los Angeles County Superior Court. On August 22, 1957, he was sentenced to be executed for these crimes in accordance with applicable law. A codefendant, Clyde Bates, received a similar sentence.

Pursuant to the mandate of Article VII of the California Constitution, I have carefully reviewed this case.

Mr. Chavez was received on Condemned Row in San Quentin State Prison on August 29, 1957. Approximately a year later, on September 19, 1958, the convictions of Mr. Chavez and his codefendant Bates were affirmed by the California Supreme Court.

Since that date, Mr. Chavez has had three separate execution dates. He was first scheduled to be executed on January 16, 1959, but this execution was stayed by a Justice of the California Supreme Court. Chavez was next scheduled to be executed on August 14, 1959, but this execution was stayed by a federal judge. Chavez was next scheduled to be executed on February 27, 1963, but this execution was stayed by a federal judge to allow further legal proceedings. This last stay of execution was granted on February 26, 1963, the day before Chavez was to be executed. The case has remained pending in the courts since that date.

Almost four years ago I reviewed this case, and I announced at that time that I would not intervene. However, I have now concluded that the execution of Mr. Chavez would no longer be in the best interests of justice.

By virtue of the senseless and stupid act of Mr. Chavez and his codefendant of throwing gasoline into a crowded bar and then igniting it, six persons lost their lives, and two more were seriously injured. There is no question in my mind of the guilt of Mr. Chavez. He was intoxicated at the time, which may explain his senseless crime, but certainly does not justify it.

But I can no longer ignore the fact that Mr. Chavez has now been confined on Condemned Row in San Quentin State Prison for a period in excess of 9½ years. During this time, he has faced imminent execution on three separate occasions, but each time a court has intervened. The case of Mr. Chavez is a living example of what I believe to be the utter futility of capital punishment. If the State cannot carry out a duly entered sentence of execution within 9½ years, then I seriously question the right of the State to carry out the sentence at all. Moreover, holding a man under sentence of death for almost ten years amounts to de facto, if not de jure, cruel and inhuman punishment.

Executive Department

State of California

PAGE TWO

It is well recognized and widely accepted by every judge, lawyer, law enforcement official and penologist to whom I have ever talked, that if a criminal sanction is really to be effective, justice must be swift and certain. Justice delayed is justice thwarted. This case has now been allowed to drag on through court after court for year after year. No one is to blame; yet all of us concerned with the administration of justice are responsible.

I believe we have now reached a point where this matter must be brought to an end once and for all. So long as this can be done in such a way as to adequately protect society and properly fulfill the ends of justice, I have no hesitancy in taking action.

The seriousness of Mr. Chaves' crime and his subsequent conduct conclusively demonstrate to me that he should probably never again be released from prison. On the other hand, it now lies within my power to impose on him a sentence of life imprisonment. Such a sentence will adequately protect society, and also will serve as a just punishment for his crime.

In view of all of the foregoing facts, I have concluded that the interests of justice would best be served in this case by granting to Chaves a limited commutation of his present death penalty sentence to one of life imprisonment.

NOW, THEREFORE, I, Edmund G. Brown, Governor of the State of California, pursuant to the authority vested in me by the Constitution and statutes of the State of California, do hereby grant to Manuel Jose Chaves, Prison No. A-43144, a commutation of sentence from death to life imprisonment.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of California to be affixed this twenty-second day of December, A.D. nineteen hundred and sixty-six.

Edmund G. Brown
Governor of California

ATTEST

Richard M. Jordan
Secretary of State

by *Paul J. Dennis*
Deputy Secretary of State

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Manuel Jose Chaves
I have read this document.
1-4-67

THIS IS A CERTIFIED

Edmund G. Brown

SEP 12 1968

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

San Francisco Law Library

LAWRENCE E. WILSON, Warden,
California State Prison,
San Quentin,

Petitioner,

vs.

No. 21365

HONORABLE GEORGE B. HARRIS,
Judge of the United States
District Court for the
Northern District of California,

Respondent.

SUPPLEMENTAL BRIEF FOR PETITIONER

FILED

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HONORABLE GEORGE B. HARRIS,
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Respondent.

SUPPLEMENTAL BRIEF FOR PETITIONER

I

THE FEDERAL RULES OF CIVIL PROCEDURE
DO NOT APPLY TO HABEAS CORPUS.

That the Federal Rules of Civil Procedure are not appropriate in habeas corpus proceedings, except on appeal, does not require a devious route through thickets of analogies since the Federal Rules themselves clearly define the limits of their applicability. Rule 1, entitled "Scope of Rules," states that "these rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81." (Emphasis

added.) Rule 81(a)(2) specifies habeas corpus proceedings as one of the exceptions excluded from the scope of the rules by Rule 1:

"In the following proceedings appeals are governed by these rules, but they are not applicable otherwise than on appeal except to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity: . . . habeas corpus. . . ."

(Emphasis added.)

The clarity of this exclusionary provision has been obscured by the passage of time. As a consequence, a number of cases have erroneously applied certain of the Federal Rules to habeas corpus proceedings: Knowles v. Gladden, 254 F. Supp. 643 (Ore. 1965) (Rule 26); Schiebelhut v. United States, 318 F.2d 785 (6th Cir. 1963) (Rule 33); United States v. Wiman, 304 F.2d 53 (5th Cir. 1962) (Rule 36); Smith v. United States, 174 F.Supp. 828 (S.D. Cal. 1959) (Rule 35). It is important to note that all of these cases were decided 20 years or more after the Federal Rules had been adopted, and long after those who wrote them and applied them were still in the vanguard of active practitioners.

The genealogy of the Rule 81 exceptions discloses that the habeas corpus exclusion was neither casually inserted nor intended as part of a catchall section. The exceptions incorporated in the preliminary draft of the Federal Rules did not include a reference to habeas corpus. However, as Edward H. Hammond, a member of the legal staff of the Supreme Court's Advisory Committee on Federal Rules, noted, the final draft specifically excluded habeas corpus, evidently as the result of suggestions from the bench or bar. Hammond, Some Changes in the Preliminary Draft of the Proposed Federal Rules of Civil Procedure, 23 A.B.A.J. 629, 634 (1937).

It is clear that the framers of the Federal Rules, in making specific reference to habeas corpus in Rule 81, intended that the Federal Rules should not apply to habeas corpus proceedings. Habeas corpus, though considered a "civil action," was nevertheless a "special proceeding" to which the normal rules for civil actions did not apply, except when a habeas corpus question was appealed. On March 4, 1938, Edgar B. Talman, the Secretary of the Advisory Committee on Rules for Civil Procedure, appeared before the Committee of the Judiciary for the House of Representatives. In explaining the proposed Federal Rules, which required congressional approval, Mr. Talman testified:

"Rule 81 is entitled 'Applicability in General.'

The rules are intended to apply to all civil actions, but there are some special proceedings for which a special procedure has already been prescribed by Congress and to which they do not apply. . . . They apply [only] to appeals with regard to . . . habeas corpus. . . ." Hearings before the House Committee on the Judiciary, 75th Cong. 3d Sess., ser. 17, at 130 (1938).

That Rule 81 excludes habeas corpus proceedings from the scope of the Federal Rules is also evidenced in statements made by William D. Mitchell, Chairman of the Advisory Committee on Rules for Civil Procedure, during his discussion of the rules at various symposiums conducted by the Institute on the Federal Rules of Civil Procedure held in 1938 under the auspices of the American Bar Association. Chairman Mitchell stated that "the rules . . . do not apply in . . . habeas corpus. . . . That is all dealt with in Rule 81." American Bar Association, Proceedings of the Institute on the Federal Rules of Civil Procedure at Washington, D.C., and of the Symposium at New York City, at 187 (1938). "Nor do the rules apply to . . . habeas corpus, . . . except as to appeals." Id., at 230. That Rule 1, by its reference to Rule 81, does not extend the coverage of the Federal Rules to habeas corpus proceedings, is made clear by this discussion by Chairman Mitchell:

"The only other matter I need speak of in Rule 1 is the reference to Rule 81. Rule 1 provides, 'These rules govern the procedure in the district courts of the United States in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81.' I will just skim over Rule 81 for a moment, to give you the idea. . . . They [these rules] do apply to appeals, but not otherwise, in cases . . . [of] habeas corpus. . . ." Id., at 233. (Emphasis added.)

The reasoning behind the exclusion of habeas corpus proceedings is not readily apparent, though the text of Rule 81 does suggest it. Rule 81 states that the Federal Rules do not apply to habeas corpus proceedings "except to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity." Texts and cases prior to the adoption of the Federal Rules are not particularly enlightening as to the procedure followed in habeas corpus actions. However, the reasoning of the Advisory Committee is revealed in the testimony of Mr. Talman, the Secretary of the Committee, when he appeared before the House Committee on

the Judiciary during its hearings on the proposed rules. In explaining why, under Rule 81, the Federal Rules did not apply to habeas corpus proceedings, Mr. Talman said, "[T]here are some special proceedings for which a special procedure has already been prescribed by Congress and to which they do not apply." Hearings before the House Committee on the Judiciary, 75th Cong., 3d Sess., ser. 17, at 130 (1938). (Emphasis added.) Thus it is clear that the Federal Rules were not extended to habeas corpus because federal statutes already established what procedure was to be followed. This, then, explains the somewhat ambiguous note to Rule 81 which was appended by the Advisory Committee: "For example of statutes which are preserved by paragraph (2) see: . . . Title 28 . . . (Habeas corpus). . . ." Fed.R.Civ.P. 81, note to subdivision (a).

Discussions of the then new Federal Rules by contemporary practitioners disclose a uniform interpretation of Rule 81 as excluding habeas corpus from their coverage.

"In federal practice there are a number of cases of special nature which are not ordinary civil actions. Rule 81 makes specific mention of a good many special actions which are governed in whole or in part by special statutory provisions and to which these rules

do not apply except to the extent stated in Rule 81. In connection with the application of the rules, it is, therefore, essential to look at Rule 81 so as to see where they do not apply." Edmunds, New Federal Rules of Civil Procedure, 4 John Marshall L.Q. 291, 293 (1938-39).

"The exceptions mentioned in this rule [Rule 1] refer to certain proceedings named in Rule 81, such as bankruptcy, admiralty, citizenship, deportation and others [including habeas corpus], to which the new rules do not apply." Hopkinson, New Federal Rules of Civil Procedure compared with the Former Federal Equity Rules and the Wisconsin Code, 23 Marq.L.Rev. 159, 161 (1938).

Mr. Hopkinson further noted that "in the following proceedings, these rules apply only to appeals: . . . habeas corpus. . . ." Id. at 188 (interpreting Rule 81).

That federal statutes existed and governed practice and procedure in habeas corpus cases is also indicated by examination of Title 28 of the United States Code. Section 2246 describes the permissible procedure:

"On application for a writ of habeas corpus, evidence may be taken orally or by deposition,

or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits."

In Knowles v. Gladden, 254 F.Supp. 643 (Ore. 1965), Judge Kilkenney, who held that section 2246 was not the exclusive procedure allowed, observed that that section was not enacted until after Rule 81(a)(2) had been in effect for 10 years. Id., n.3 at 254 and accompanying text. Judge Kilkenney concluded that section 2246 was not exclusive since it was enacted with knowledge of the Federal Rules and thus had to incorporate their import. He did not, however, take notice of the fact that section 2246 was merely declaratory of existing law and practice rather than being a new restriction. "It [section 2246] clarifies existing practice without substantial change." 28 U.S.C. § 2246, reviser's note (1964). (Emphasis added.) Nor was he aware that Congress had approved the Federal Rules on the assumption that they would not apply to habeas corpus proceedings because of the "special nature" of such actions in which procedure was "already . . . prescribe by Congress." Hearings before the House Committee on the Judiciary, 75th Cong., 3d Sess., ser. 17, at 130 (1938).

The Gladden case, and the decisions in Schiebelhut, Wiman, and Smith, are clearly erroneous. In none of these

cases were the courts apprised of the fact that the Federal Rules were never, in any part whatsoever, extended to habeas corpus proceedings.

It is also important to note that the federal courts cannot, by interpretation or any other means, extend the Federal Rules to habeas corpus proceedings. In authorizing the Federal Rules, it was the understanding of Congress that the Rules were a delegation of congressional power to limit the jurisdiction of federal courts. This is made clear by the report of Representative Sumners in presenting the Federal Rules to the House:

"It should be emphasized that any and all of the rules of procedure are subject to modification or repeal by Congress. Furthermore, it is the opinion of the Committee that amendments made by the Supreme Court to the united rules must be submitted to Congress in accordance with the method prescribed for submitting the original rules, i.e., they must be submitted to Congress by the Attorney General at the beginning of a regular session and will not go into effect until after the close of that session." H.R. Rep. No. 2743, 75th Cong., 3d Sess. 3-4 (1938).

The scope of the Federal Rules is therefore tantamount to

a jurisdictional grant by Congress. In view of the specific exclusion of habeas corpus proceedings under Rule 81, and because it was the intent of Congress that such actions should be governed by existent statutory procedure, it is submitted that no federal court can increase its jurisdiction by applying the Federal Rules of Civil Procedure to habeas corpus cases except, of course, that the rules may be applied, under Rule 81, to habeas corpus appeals.

II

FEDERAL PRACTICE DOES NOT PERMIT DISCOVERY IN HABEAS CORPUS PROCEEDINGS.

The exact federal practice in regard to procedure in habeas corpus cases is not clear. Examination of all authorities on the subject has failed to disclose any case wherein discovery has been allowed in habeas corpus (with the exception of the recent, and erroneous, Gladden and Schiebelhut cases, both of which relied on the Federal Rules). The silence of all authorities would suggest that it is not the practice, and has never been the practice, to allow discovery in habeas corpus proceedings. The existing practice has apparently extended no further than to depositions, oral evidence, and affidavits, used as part of an evidentiary hearing. 28 U.S.C. § 2246 and reviser's note (1964).

Discovery interrogatories are the result of Equity

Rule 58. Fed.R.Civ.P. 33, notes of Advisory Committee. This was the only federal provision permitting discovery prior to adoption of the Federal Rules. 2A Barron and Holtzoff, Federal Practice and Procedure § 641 at 11 (1961). Habeas corpus is a civil proceeding. Fisher v. Baker, 203 U.S. 174, 181 (1906). Thus the equity rule concerning discovery has never applied to proceedings in habeas corpus.

CONCLUSION

For the foregoing reasons, and for the reasons advanced in petitioner's opening brief, it is respectfully submitted that a writ of mandamus and/or prohibition should be granted.

DATED: February 10, 1967

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DEC 3 1967

**In the United States Court of Appeals
for the Ninth Circuit**

EXBER, INC., d/b/a EL CORTEZ HOTEL, PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT.

**ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR
ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR
RELATIONS BOARD.**

**BRIEF FOR THE NATIONAL LABOR RELATIONS
BOARD**

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FILED

DEC 4 1967

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**In the United States Court of Appeals
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No. 21,362

EXBER, INC., d/b/a EL CORTEZ HOTEL, PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT.

*ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR
ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR
RELATIONS BOARD.*

**BRIEF FOR THE NATIONAL LABOR RELATIONS
BOARD**

JURISDICTION

This case is before the Court upon petition of Exber, Inc., d/b/a El Cortez Hotel, pursuant to Section 10(f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*), to review an order of the National Labor Relations Board issued on September 29, 1966 (R. 330-361, 384-385).¹

¹ References to the pleadings, decision and order of the Board, and other papers reproduced as "Volume I, Pleadings," are designated "R". References to portions of the stenographic transcript reproduced pursuant to Court Rules 10 and 17 are designated "Tr.". References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. References designated "GCX" or "RX" are to exhibits of the General Counsel or the Company (respondent below).

The Board's decision and order are reported at 160 NLRB No. 115. The Board has cross-petitioned for enforcement of its order in full (R. 394). This Court has jurisdiction over the proceeding, the unfair labor practices having taken place in Las Vegas, Nevada, where petitioner (the "Company" herein) operates a hotel and gambling casino. The Company here raises no issue of jurisdiction.

COUNTERSTATEMENT OF THE CASE

I. The Board's Findings of Fact.

The Board found that the Company violated Section 8(a)(1)² of the Act by coercively interrogating certain employees, threatening them with reprisals for engaging in union activities, and creating the impression that it was keeping the employees' union activities under surveillance. The Board also found that the Company discharged 5 employees because of their union adherence in violation of Section 8(a)(3) of the Act. The facts upon which the Board's findings are based are summarized below.

A. *The Company's business operation*

The Company, a Nevada corporation, is engaged in the operation of a hotel, restaurant, bar, and gaming casino in Las Vegas, Nevada (R. 6, 10). The Company's principal stockholders also have financial interests in other licensed gambling casinos in or near Las Vegas (R. 336). This proceeding concerns only the dealers in the Company's downtown gambling casino.

² The relevant statutory provisions are printed *infra*, pp. 38-40.

The Company operates the gambling casino 24 hours per day, in 3 shifts. It employs approximately 45 dealers, who run games such as keno, blackjack, roulette, and craps. Approximately 40 percent of the Company's dealers are apprentices, or "break-ins." They start as "shills"—i.e., employees who start activity at inactive gaming tables—and earn from \$10 per day to the maximum \$22.50 a day the Company pays experienced dealers (R. 336).

B. The Union organizes the Company's dealers and petitions for representation.

In May 1964, the Union³ launched a widespread effort to organize employees in the Nevada gambling casino industry (R. 337; Tr. 85, 281). The Union's efforts became common public knowledge in the area as a result of close coverage by local newspapers, television, and radio (R. 337; 235-236, 85). During this period, the Union sought to organize the Company's dealers. About May 10, 1964,⁴ employees Louis Cantalamessa, Bob Jones, and Albert Alcini signed authorization cards and began to organize other employees (R. 343; Tr. 149-150), 185, 278). Within a few days after the organizing drive began, supervisor Albert Faccinto told Cantalamessa that he had heard "something about a union being organized" and that "I want you, Bob Jones, Pee Wee Alcini and my nephew to stay out of it until we find out what they are doing . . ." (R. 343; Tr. 285).⁵

³ The American Federation of Casino and Gaming Employees.

⁴ Unless otherwise indicated, all dates are in 1964.

⁵ Faccinto was from the same home town as the employees mentioned and had known them for most of his life (R. 343; Tr. 455-).

On June 7, the Union held a meeting to establish a policy committee made up of representatives from each casino (R. 348; Tr. 185-187). Employee William Cox was designated as the representative for the Company's employees (R. 348; Tr. 187). On June 11, the Union notified the Company by registered letter that it "had been designated by a majority of your employees composed of dealers (including roulette, blackjack, '21', craps, poker and other dealers) as the collective bargaining representative of such employees." The Union requested a meeting with Company representatives for the purpose of negotiating a collective bargaining agreement (R. 337-338; GCX 2(a)). On June 15, after having received no reply from the Company with respect to the recognition request, the Union filed a petition for representation with the Board (R. 338; GCX 3).⁶

C. Company official Musso singles out employee Cox as the Union instigator in the casino.

On June 18, several employees who worked the No. 1 crap table on the graveyard shift (3:00 a.m. to 11:00 a.m.) were taking a break in the coffee shop when their shift boss, Thomas Musso, approached (R. 338; Tr. 108, 189). Musso asked employee Alfred Bellson

457). Faccinto stated that the Company was waiting to see if the gaming employees at the Golden Nugget joined a Culinary Union before it gave its employees "the word" (R. 343; Tr. 281).

⁶ Before the Board, the Union's petition for representation at the Company was consolidated with similar petitions involving 8 other casinos. After a hearing, the Board concluded that it would effectuate the purposes of the Act to assert jurisdiction over the industry; it found that a question of representation existed; and issued a Decision and Direction of Elections. *El Dorado, Inc.*, 151 NLRB 579.

if he had joined the Union, and Bellson replied in the negative (R. 339; Tr. 108, 190). He then asked employee Cox if he had joined the Union (R. 339; Tr. 108, 190-191). Cox said he had not, although he had signed a card and was the representative of the employees on the Union policy committee (R. 339; Tr. 184-187). Bellson returned to work at that point, but Cox, who still had 20 minutes of rest period to go, continued the discussion with Musso (R. 339; Tr. 190-191, 108-109). Musso then said to Cox: "there has been many people fired out on the Strip because of this Union" (R. 339; Tr. 191).⁷ Cox replied that he was unaware of this and stated that employees were protected by law from discharge for union activity. Musso said, "Well, nobody is going to tell me who I can hire and fire" (Tr. 191), and added that he was "not about to watch anybody for 30 days" in order to give him a trial period as demanded by the Union (Tr. 192). He said if the Union came in, the Company would "just take out the pit" (i.e. remove all games except slot machines). He added that the Company could hold out longer than could the employees "out on the street" (R. 339; Tr. 192-193). Musso said the Company did not need "the pit" because it could make money from the slot machines. He then expressed doubt that the employees would join the Union (Tr. 192-193). Cox replied that job security and pay raises might be persuasive to the employees, and Musso said, "You seem to know a hell of a lot about that Union not to be a member" (R. 339; Tr. 194). Cox then

⁷ The "Strip" is a highway on the Las Vegas outskirts where the principal casinos are located.

went to the restroom prior to returning to work. Musso walked over to the No. 1 crap table in the casino, tossed out a roll of money and said to the employees working there: "I bet all of that against a penny that Cox is the instigator of this union activity" (R. 339; Tr. 136, 109, 170). Musso asked if there were any "takers"; receiving no answer, he said, "You're darn right, there is no takers", picked up his money, and walked away (R. 339; Tr. 109).

D. The Company discharges employee Cox.

About 4:00 a.m. on June 22, Cox was working as the stickman⁸ at the No. 1 crap table (R. 346; Tr. 196-197). One of the players at the table placed a quarter bet for himself and offered another quarter as a tip for the dealers (Tr. 197).⁹ Cox, understanding that the player was designating that the tip be bet in the same slot as his bet, wagered the quarter. The bet was lost, and nothing was said by Joe Chiara, the "box man" or table supervisor (Tr. 196-197, 198-199).¹⁰

About 7:30 that morning, Cox told Chiara that he

⁸ The stickman stands beside the crap table and moves the dice to the appropriate player.

⁹ According to the Company's practice, all dealers share in all tips. When a player gives a tip to the crew, the stickman takes the money, puts it in his pocket until he leaves the table, and then puts the tip in a box; the tips are then allocated among the crew every 24 hours (R. 352, n. 17; Tr. 105). In some cases, the player designates that the tip is to be bet for the dealers; the player then must designate where the tip is bet. If the bet is won, the entire amount goes in the box (Tr. 105-106).

¹⁰ The box man sits at the center of the crap table and presides over the game. His primary functions are to ascertain that cheating is avoided, to handle the money, and to assure that the payoffs are correct (R. 336). The Company admitted that box man Chiara was a supervisor (R. 7; Tr. 30-32).

thought two of the players at the table were underage. Chiara replied that it was not his job to watch out for minors but to check on crooked dice; nevertheless, he reported to Musso, who asked the minors to leave (R. 346; Tr. 198). Cox then remarked to Chiara that it was equally as bad to allow minors to gamble as to have crooked dice. Chiara told Cox that the matter was none of Cox's business, and then, referring to the earlier tip incident, remarked: "Furthermore, the next time somebody gives you some money, don't bet it for the dealers. Just stick it in your pocket. . . . If I was in on the tokens [tips], you could do things a little differently" (R. 346; Tr. 198-199).¹¹ Cox responded by directing an obscene remark toward Chiara (R. 346; Tr. 199).

For the remainder of that shift, Chiara said nothing to Cox. Chiara left the casino about 10:45 a.m., and Cox, accompanied by Bellson, left about 11:00 a.m. (R. 348; Tr. 200, 202, 609). About an hour later, Musso telephoned Bellson, erroneously thinking Cox roomed with him, and told him to tell Cox that he was discharged because of the trouble he had had with the box man (R. 347; Tr. 121). Cox, upon receiving the message, called Musso, who confirmed the discharge, giving as a reason that he was "tired of all of this stuff with Joe [Chiara]" (R. 347; Tr. 204).

Immediately after his discharge, Cox went to a union meeting scheduled for that afternoon (R. 348-349; Tr.

¹¹ Chiara's last remark referred to the policy of not including the box man in the tips unless the player so specified (R. 352, n. 17; Tr. 106, 443). This practice was a source of annoyance to Chiara, who had sought on several occasions to get himself included in the dealers' tips (Tr. 106-107, 201).

205). He sought out Union Representative Thomas Hanley and informed him that he had been discharged. Hanley called Mr. Gaughan, the Company president, and arranged a meeting for the next day to discuss reinstatement of Cox (R. 349; Tr. 205-206). The meeting with Gaughan was held as scheduled on the following morning; Gaughan stated he had just returned from a trip and was not familiar with the details of the discharge; but he agreed to reinstate Cox immediately, placing him on the swing shift (7:00 p.m. to 3:00 a.m.) so as to avoid conflict with Musso (R. 349; Tr. 206-207, 364-365).

When Cox reported as instructed on the next day, June 24, Musso directed him to see Gaughan. Cox did, and Gaughan immediately said, "I hear you have been doing bad things" (R. 349; Tr. 208). Before he could elaborate, Musso approached and related the obscenity Cox had directed toward Chiara on the day of the discharge (R. 349; Tr. 208). Cox prevailed upon Gaughan to discuss the matter in private in Gaughan's office, and once there, related the facts which led up to the swearing incident. Gaughan's first response to this explanation, however, was to remind Cox that the "gambling business was a close-knit fraternity", and that if Gaughan so desired it "would be awfully difficult" for Cox to obtain further employment in the industry (R. 349; Tr. 209). He further stated that he relied heavily upon his subordinates and that a disagreement between his supervisors and the Union could lead him reluctantly to shut down, because "if it came to a showdown with the Union, he would rather close up the pit completely"

(R. 349; Tr. 210). Cox stated that he was interested only in going back to work and requested that Musso be called in to see if “some amicable agreement” could be worked out in that regard (R. 349; Tr. 210).

Musso and Donald Dobson, the Company’s general manager, were summoned into the office, and Gaughan left to attend other business. Cox asked Musso if his discharge was related to their earlier (June 18) conversation about the Union. Musso angrily denied ever having a conversation with Cox about a union, and said, “If you say I did, Cox, I will kill you” (R. 349; Tr. 211). Dobson then spoke up, and told Cox he was terminated because of his attitude. He added: “Cox, you’ve got a big mouth. You think you are going to change the gambling industry overnight. We are going to be here long after you and the Union are forgotten” (R. 350; Tr. 212). Dobson further asked Cox why he wanted to “go back to work for someone who doesn’t want you? You are working for Mr. Hanley [the Union agent] now” (R. 350; Tr. 213). During this same conversation, Musso told Cox that “We know all of the troublemakers in this club. We have all of their names. Why you were even sitting up on the stand at the last meeting [the Union meeting held a few hours after Cox’s discharge]. I couldn’t believe it” (R. 350; Tr. 212).¹² At this point Cox left the meeting; he told Hanley what had occurred and Hanley arranged a second meeting with Gaughan for the following day (R. 350; Tr. 214).

¹² Musso’s remark apparently refers to Cox’s seat, as a member of the Union’s policy committee, on the raised platform at that meeting (Tr. 188-189).

Hanley, Cox, and two Union representatives met with Gaughan the following afternoon, June 25. Cox mentioned to Gaughan that Musso had threatened to kill him. Gaughan expressed his awareness of the threat, and acknowledged that Musso had a bad temper. But Gaughan stated that it was up to Musso as to whether or not Cox was rehired, because Musso had threatened to quit if Cox were rehired and he “didn’t want to disorganize or disrupt his whole organization just to rehire one man” (R. 350; Tr. 214-215).

Musso and Dobson entered the room at that point, and the parties discussed the reasons behind Cox’s discharge. When Cox inquired if his termination was related to his earlier conversation with Musso about the Union, Musso denied the conversation, called Cox a “damn liar”, and then directed obscenities at Cox (R. 350; 216, 370). Musso later asserted that the sole reason for the discharge was Cox’s trouble with Chiara. At Cox’s request, Chiara was then called into the meeting. Musso asked Chiara if he had had trouble with Cox, and Chiara replied that he “had trouble with all them [the dealers] . . . They all give me a bad time.” (R. 350; Tr. 217-218).¹³ Answering a question from Hanley, Chiara stated that he had no objection to Cox’s reinstatement, but asked that Cox be put on another

¹³ There had been considerable friction between Chiara and the dealers during the few months Chiara had been on the job, both for reasons of personality and because of Chiara’s insistence that he be included in the tips (R. 345; Tr. 102-103, 106-107, 443). On several occasions, Chiara became so disturbed by disagreements with dealers that he walked out of the casino. This happened in disputes with dealers Kabush and Threadwell on separate occasions, and again on June 21 (R. 345-346; Tr. 102-103, 216, 226-227, 372, 435-436). Musso spoke to the dealers on several occasions in an effort to secure a more harmonious relationship with Chiara (R. 346; Tr. 93).

shift. He stated that Cox was a competent and honest worker, and was not the only one to use profanity (R. 350; Tr. 218, 372). Musso stated his objection to reinstating Cox, and the meeting ended with Gaughan promising to make a decision the next day (R. 351; Tr. 218). On June 26, Gaughan informed Hanley that he would not reinstate Cox (R. 351; Tr. 375-376).

E. Company officials question other employees regarding their union adherence.

On June 23, Albert Faccinto, shift boss of the day shift, approached one of his employees, Louis Cantalamessa.¹⁴ Faccinto took Cantalamessa to a private spot in the casino and said, "Lou, I want the truth. Did you join the union?" Cantalamessa falsely answered that he had not, and Faccinto replied, "If you did join the union, it would hurt me" (R. 343; Tr. 288-290).

About the same time, Rocco Paravia, shift boss for the swing shift, saw employee David Waggoner talking to a well-known Union organizer in the hotel. When Waggoner returned to the pit, Paravia asked, "You are not fooling with this Union, are you?" (R. 344; Tr. 315-319, 449-450). Waggoner, who had signed a card in June and had persuaded other employees to join the Union (Tr. 314-315), replied "if I were going to steal, I surely wouldn't put it on the microphone." Paravia responded, "It is worse than stealing" (R. 344; Tr. 317). Paravia also inquired of employee Al-

¹⁴ Cantalamessa, one of the early Union adherents, had obtained approximately 15 signed authorization cards from Company employees, and had been engaged in an earlier discussion about the Union with Faccinto (*supra*, p. 3). He had attended a union meeting on June 22 (Tr. 290), the meeting which Musso referred to in telling Cox he had been observed on the "stand" (*supra*, p. 9).

cini: "Do you belong to the Union?" (R. 344; Tr. 146-147). Alcini denied that he had joined and Paravia walked away (R. 344; Tr. 147).

F. The Company closes a portion of its operations, discharges 4 Union adherents, and shortly thereafter reopens the operation.

On June 28, the Company decided to discontinue the operation of its No. 2 crap table on weekdays, assertedly because it was not profitable to do so, and to operate the table only on weekends (R. 352-353; Tr. 536-537, 516).¹⁵ Although the Company had staffed the No. 2 table during the weekdays with 3 "break-ins" and one experienced dealer, it discharged 4 experienced dealers (Louis Cantalamessa, David Waggoner, Robert Jones, and David Conner) when it closed down its weekday operation (R. 352-353; Tr. 183, 113, 279, 311-312).¹⁶ None of the discharges regularly worked on the No. 2 table, although Jones and Waggoner occasionally helped out there (Tr. 277-279, 310-313). Three of the discharged employees, Cantalamessa, Waggoner, and Jones, were, along with Cox, the leading union adherents and organizers among the Company's employees; and Conner also participated in the Union drive (R. 355; Tr. 292, 314-315, 317-318, 395-397).

The No. 2 table remained closed on weekdays during

¹⁵ The Company operates the No. 1 table 24 hours per day. It had operated the No. 2 table only on weekends until some time in May, when it decided that it would be profitable to open the No. 2 table on weekdays from 3:00 p.m. to 11:00 p.m. It accordingly began operating the No. 2 table during these hours on June 4 (R. 352-353; Tr. 181, 183, 513-515, 517-522).

¹⁶ Conner earned \$20.50 per day, and the others received top pay for dealers, \$22.50 per day (Tr. 601, 312, 279, 280).

July. On August 1, the Company again opened the table on an everyday basis, and operated it that way the remainder of the year (R. 352-353; RX 8-12).

II. The Board's Conclusions and Order.

Upon the foregoing facts, the Board, in agreement with the Trial Examiner, concluded that the Company violated Section 8(a)(1) of the Act by interrogating its employees concerning their union activities, by threatening them with reprisals, and by creating the impression of surveillance of their union activities. The Board further concluded that the Company violated Section 8(a)(3) and (1) of the Act by discharging employees William Cox, Louis Cantalamessa, Robert Jones, David Conner and David Waggoner because of their union activities.

The Board ordered the Company to cease and desist from the unfair labor practices found and from in any other manner interfering with, restraining, or coercing the employees in the exercise of their rights under the Act. Affirmatively the order requires the reinstatement of the five employees with back pay and the posting of the usual notices (R. 384-385, 330-361).

SUMMARY OF ARGUMENT

I. The Board properly concluded from the credited evidence that the Company violated Section 8(a)(1) of the Act. Immediately after the Union filed a petition for representation, Company officials questioned employees as to their union adherence, announced that other casinos had discharged employees because of the Union, and threatened to close down "the pit" (the gambling area) before allowing it to become organized.

A Company official offered to bet a group of employees that employee Cox was the "instigator" of the union activity, told employees on different occasions that he knew who the union adherents were, and told employee Cox that he had been observed at the most recent union meeting. The Board concluded from the foregoing conduct that the Company had coercively threatened and interrogated the employees, and had created the impression that the employees' union activities were under surveillance.

II. Substantial evidence supports the Board's finding that the Company discharged employee Cox because of his union activities, and not because of an obscene remark he made to a supervisor during a quarrel about their work. Cox was a leading union adherent who had held union meetings in his home, had persuaded other employees to sign authorization cards, and was the employees' representative on the union policy committee. Several days prior to Cox's discharge, Supervisor Musso interrogated Cox about his union activity and threatened that the "pit" would be closed before the Company would recognize the Union. A few minutes later, Musso offered to bet a roll of money that Cox was the "instigator" of the union activity in the casino. Cox was discharged shortly thereafter, assertedly because of his remark to another supervisor. Cox sought to appeal his discharge, but was told by the general manager that the Company did not want him, and that he was working for the Union now. The general manager also told Cox, "You think you are going to change the gambling industry overnight. We are going to be here long after you and the Union are

forgotten." Company President Gaughan denied Cox's request for reinstatement, stating that he would close the "pit" completely if it came to a showdown with the Union. Gaughan also informed Cox that the gambling industry was a "close-knit fraternity" and that it would be difficult for Cox to obtain further employment in the industry if Gaughan so desired.

Furthermore, in view of other relevant facts, the Company's objection to Cox's remark appears to be no more than a pretext for discharging him. Chiara, the supervisor at whom the remark was directed, informed the Company officials at the reinstatement meeting that he had no objection to Cox's reinstatement, that Cox was a competent and honest worker, and that Cox was not the only employee who used profanity. Moreover, Chiara, in just a few months with the Company, had been involved in three other incidents, with employees other than Cox, which caused him to walk off the job in anger and leave the casino. No such reaction followed Cox's remark. Chiara also declined to single out Cox as a trouble-maker, but stated that he (Chiara) had trouble with all the dealers.

III. Substantial evidence supports the Board's conclusion that the Company discriminatorily discharged employees Cantalamessa, Jones, Conner, and Waggoner. Each of these employees participated in the union's organizing drive; and the evidence positively shows that Cantalamessa, Jones and Waggoner were, along with Cox, principally responsible for organizing the other employees for the Union. Company officials threatened and interrogated some of these discharges as well as other employees shortly before the dis-

charges, and Supervisor Musso stated on several occasions to different employees that he knew just who the union adherents were. Three of the dischargees received the top pay for dealers of \$22.50 per shift, and the fourth dischargee received \$20.50.

The Company's explanation for the discharges does not withstand scrutiny. It asserted that it discharged these four employees on June 28 when it decided to close down the weekday operation of the No. 2 crap table because it was unprofitable and to discharge employees to meet the "automatic overstaffing" that resulted. None of the dischargees worked on that operation. Company records do not support the Company's contention that the weekday operation of the No. 2 table was unprofitable. That table earned more than \$15,000.00 in June, the only month it had operated on weekdays. Yet, when the Company reopened the weekday operation of the table a month later, it kept it open even though it earned only about \$3,000.00 the first month and lost money every month thereafter. Moreover, the Company asserted that the volume of business handled on the table was not sufficient to justify keeping it open, but the volume of business on the table was no greater during the period thereafter when the Company kept the table open month after month. Furthermore, Company records indicate that conditions were less favorable, under the Company's own standards, for reopening the table in August than for originally opening it in June. The Company never adequately explained why it reopened the table under these circumstances, just a month after it had closed the table because it was "unprofitable."

The Board also found that without regard to the validity of the Company's motive in shutting down table No. 2, the reasons given by the Company for singling out the four union adherents for discharge were inconsistent, contradictory and unconvincing in light of the entire record, and concluded that these reasons were not sufficiently credible to dispel the prima facie case of discriminatory motive which the General Counsel had established.

IV. The Board rejected two procedural objections raised by the Company. (1) The Board properly allowed an amendment to the complaint to include two dischargees listed on an amended charge. Although the amended charge was filed more than six months after the discharge, it was not time-barred by Section 10(b) of the Act. The amended charge related back to the original, timely charge, which alleged the same violations of the Act as to other employees for the same incident, the closing of the weekday operation of the No. 2 table. Since the law recognizes that the charge in these cases serves merely to set in motion the Board's investigatory machinery, and is not to be construed as binding as a pleading in private litigation, courts have found it permissible for the amended charge to "relate back" to the time of the original charge. (2) The Board properly upheld the discriminatory discharges of employees Conner and Jones despite their failure to testify at the hearing. Credible evidence established their participation in the organizing drive and the Company's unlawful motivation for the discharges. Their testimony was not essential to finding discriminatory motive because that is a fact as

to which the employer alone, not the employees, has particular knowledge. In any event, Jones had moved out of the state and could not be located at the time of the hearing, and Conner was unavailable when the General Counsel called him to testify.

ARGUMENT

I. Substantial Evidence on the Record as a Whole Supports the Board's Finding That the Company Violated Section 8(a)(1) of the Act by Interrogating and Threatening Its Employees Regarding Their Union Activities, and by Creating the Impression of Surveillance Over These Activities.

As shown in the Statement, the Company immediately sought to determine the source and extent of union adherence among its employees and sought to discourage such adherence as soon as it became aware of the Union's organizing drive. Instead of conducting its campaign within permissible limits, Company officials interrogated employees regarding their union activities without assurances against reprisals, threatened that a shut down or discharges would follow the Union's advent, and indicated that the employees' union activities were under surveillance. As we show below, the Company's conduct plainly discloses a pattern of unlawful interference with the employees' organizational rights, and the Board properly held that the Company violated Section 8(a)(1) of the Act.

Thus, according to the credited testimony, three days after the Union filed a representation petition with the Company and had requested bargaining, shift boss Musso asked employees Cox and Bellson if they had joined the Union (R. 339; Tr. 108, 190-191, 184-187). After Cox falsely replied in the negative, and

Bellson walked away, Musso informed Cox that “many people” on the Strip had been fired “because of this Union” (R. 339; Tr. 191). Musso thereafter announced that the Company “would take out the pit” before it would become organized, and that the Company “could last a lot longer” than could the employees out on the street (R. 339; Tr. 192-193). Musso’s remarks comprise bald threats of reprisal contingent solely upon the advent of the Union, and are thereby violative of the Act; and the interrogation of the employees, in this context, could have no other effect than to “impede and coerce the employees in their right of self-organization.” *N.L.R.B. v. Nabors*, 196 F. 2d 272, 275, (C.A. 5), cert. denied, 344 U.S. 865. Accord: *N.L.R.B. v. Ambrose Distributing Co.*, 358 F. 2d 319, 320-321 (C.A. 9), cert. denied, 385 U.S. 838; *Bon Hennings Logging Co. v. N.L.R.B.*, 308 F. 2d 548, 552-553 (C.A. 9); *N.L.R.B. v. Price Valley Lumber Co.*, 216 F. 2d 212, 215-216 (C.A. 9), cert. denied, 348 U.S. 943; *N.L.R.B. v. Howard-Cooper Corp.*, 259 F. 2d 558, 560-561 (C.A. 9).

Moreover, testimony explicitly credited by the Trial Examiner shows that during this period other Company officials also interrogated employees about their union adherence: shift boss Faccinto, after earlier having told employee Cantalamessa to “stay out” of the Union, inquired if Cantalamessa had joined the Union (R. 343; Tr. 288-290, 281); and shift boss Paravia asked employees Alcini and Waggoner on separate occasions if they had joined the Union (R. 343-344; Tr. 314-319, 449-450, 146-147). In none of these instances did the Company offer assurances against reprisal, and in each instance, as in the questioning

of employee Cox, the employee falsely denied having engaged in Union activity (*supra*, pp. 5, 11-12). The presence of these factors renders the "coercive effect" of such questioning "more likely." *N.L.R.B. v. Camco, Inc.*, 340 F. 2d 803, 806-807 (C.A. 5), cert. denied 382 U.S. 926, and cases cited therein. This and other courts have found similar interrogation to be violative of the Act "because of its natural tendency to instill in the minds of employees fear of discrimination on the basis of the information the employer has obtained." *N.L.R.B. v. West Coast Casket Co., Inc.*, 205 F. 2d 902, 904 (C.A. 9), and cases cited therein. See also, *N.L.R.B. v. Camco, Inc.*, *supra*; *Martin Sprocket & Gear Co. v. N.L.R.B.*, 329 F. 2d 417, 419-420 (C.A. 5); *Daniel Construction Co. v. N.L.R.B.*, 341 F. 2d 805, 812 (C.A. 4), cert. denied, 382 U.S. 831; *Edward Fields, Inc. v. N.L.R.B.*, 325 F. 2d 754, 758-759 (C.A. 2). Cf., *Bourne v. N.L.R.B.*, 332 F. 2d 47, 48 (C.A. 2). Accordingly, we submit that the record amply supports the Board's findings that the Company's interrogation violated Section 8(a)(1) of the Act.

Furthermore, the conduct of Musso on several occasions indicated to the employees that their union activities were under surveillance. Several days prior to Cox's discharge, Musso tossed a roll of money on a table in front of several employees and offered to bet the roll "against a penny" that Cox was the instigator of the union activity; when no one answered, Musso exclaimed, "You're darn right, there is no takers," picked up his money and left (R. 339; Tr. 109, 170, 136). And on the day after Cox's discharge, Musso informed him that he had been observed sitting on the

stage at a union meeting (R. 350; Tr. 212). Musso also stated to different employees on several occasions that he knew who the union adherents were (Tr. 373, 212, 110-111). We submit that the Board properly concluded from these facts that such conduct gave the impression of surveillance of the employees' union activities, and thereby coerced or restrained employees in violation of section 8(a)(1) of the Act. See, *N.L.R.B. v. Prince Macaroni Mfg. Co.*, 329 F. 2d 803, 805-806 (C.A. 1); *N.L.R.B. v. S & H Grossinger's Inc.*, 372 F. 2d 26, 28 (C.A. 2); *Hendrix Mfg. Co. v. N.L.R.B.*, 321 F. 2d 100, 104-105 (C.A. 5); *International Union of Electrical, etc., Workers v. N.L.R.B.*, 352 F. 2d 361, 362 (C.A. D.C.), cert. denied, 382 U.S. 902, enforcing 147 NLRB 809, 820 (statement that Company knew who signed cards); *N.L.R.B. v. Gotham Shoe Mfg. Co.*, 359 F. 2d 684, 685 (C.A. 2), enforcing, 149 NLRB 862, 869, 870 (statement that Company knew how many employees attended a union meeting).¹⁷

The Company in its brief does not raise issue with the conclusions the Board drew from these facts; instead, it argues that the Trial Examiner and the Board erred in making credibility resolutions as to what were the facts (Br., pp. 19-28). We submit that

¹⁷ The Fifth Circuit in *Hendrix Mfg.*, *supra*, reasoned (321 F. 2d at 104, n. 7):

Surveillance becomes illegal because it indicates an employer's opposition to unionization, and the furtive nature of the snooping tends to demonstrate spectacularly the state of the employer's anxiety. From this the law reasons that when the employer either engages in surveillance or takes steps leading his employees to think it is going on, they are under the threat of economic coercion, retaliation, etc.

this argument raises no issue of merit. The law is settled that credibility resolutions are matters for the Examiner and the Board and that absent extraordinary circumstances a court upon review will not re-evaluate the testimonial conflicts. *R. J. Lison Co., Inc. v. N.L.R.B.*, 379 F. 2d 814, 817-818 (C.A. 9); *N.L.R.B. v. Thrifty Supply Co.*, 364 F. 2d 508, 509 (C.A. 9); *N.L.R.B. v. Carpenters Local No. 2133*, 356 F. 2d 464, 466 (C.A. 9); *N.L.R.B. v. Radcliffe*, 211 F. 2d 309, 315 (C.A. 9), cert. denied, 348 U.S. 833; *N.L.R.B. v. Luisi Truck Lines*, — F. 2d —, No. 21554, Oct. 27, 1967 (C.A. 9). The Trial Examiner here, affirmed by the Board, carefully resolved the testimonial conflicts with reference not only to the content of each witness' testimony but also to their respective demeanor upon the witness stand (R. 339-344). The Company cites no credited testimony which "carries its own death wound" and can show no discredited evidence which "carries its own irrefutable truth." *N.L.R.B. v. Pittsburgh Steamship Co.*, 337 U.S. 656, 660, quoting from *N.L.R.B. v. Robbins Tire & Rubber Co.*, 161 F. 2d 798,

¹⁸ In an attempt to show that the credited testimony suffers from "inherent incredibility" (Br. p. 28), the Company overlooks and misstates salient factors. E.g., in faulting the Examiner's crediting of Cantalamessa over Faccinto (Br., pp. 19-21) the Company does not mention that it called Faccinto to the stand, that he admitted that he "probably" talked to Cantalamessa about the Union, and that he failed to deny any of the statements made by Cantalamessa (R. 343; Tr. 454-459). Moreover, contrary to the intimations in the Company brief (p. 20), the record shows no material inconsistency between Cantalamessa's testimony and his pre-hearing affidavit (Tr. 276-305); and it also shows that Faccinto *did* have a relative, a brother-in-law, working at the Company (Tr. 457). Further, there is no merit in the Company's attempt (Br. p. 21) to assail the testimony of Waggoner because the General Counsel did not call Union agent Scott to corroborate it, for the record plainly shows that Scott was not present when Paravia questioned Waggoner

800 (C.A. 5).¹⁸ Indeed, the Examiner's report indicates a thoughtful and reasonable evaluation of the conflicting testimony, and his resolutions of credibility are therefore entitled to stand.

II. Substantial Evidence on the Record as a Whole Supports the Board's Finding That the Company Violated Section 8(a)(3) and (1) of the Act by Discharging Five Employees Because of Their Union Activities.

Within two weeks after the Union demanded recognition as the majority representative among the Company's gambling casino employees, the Company discharged 5 employees, all union adherents. According to the Company, the discharges were all for legitimate business considerations; but the Board found that the asserted reasons for the discharges were pretexts, and that the Company, in reality, discharged the employees because of their union activities.

The determinative question in cases such as this is one of fact—i.e., what was the “actual motive” for the discharge. *Shattuck Denn Mining Corporation v. N.L.R.B.*, 362 F. 2d 466, 470 (C.A. 9). In determining this question, the Board is entitled to rely upon circumstantial as well as direct evidence, and its inference of motivation must stand where it is reasonable and supported by substantial evidence on the record con-

(Tr. 316-317). Finally, the Company's list of immaterial inconsistencies (Br. pp. 21-28) relating to the credited version of Musso's conduct on June 18 is likewise assailable, but interests of space and relevance require they not be set forth here. It is sufficient to say that the Examiner found Musso's demeanor “not of a character to inspire confidence” and his testimony “evasive”, and discredited his testimony accordingly (R. 342).

¹⁹ Accord: *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488; *Bon Hennings Logging Co. v. N.L.R.B.*, 308 F. 2d 548, 553-554 (C.A. 9); *N.L.R.B. v. Mrak Coal Co., Inc.*, 322 F. 2d 311, 313, 314

sidered as a whole. *Id.* at 470.¹⁹ In determining the substantiality of the evidence upon review, the applicable principles are familiar:

* * * the court's province is confined to a determination of whether on the record as a whole, including of course the Respondent's evidence, the evidence upon which the Board based its finding was substantial. In doing that the court must make a comparison, not for the purpose of determining which contention is supported by the greater weight of the evidence, but in order to determine whether the evidence relied on by the Board is substantial in relation to the whole. [Citations omitted.] Respondent's evidence on the foregoing issues is, to us, persuasive, to say the least. But there was substantial evidence to the contrary. Under these circumstances the Board's finding of fact is conclusive. [*N.L.R.B. v. Injection Molding Co.*, 211 F. 2d 59, 62 (C.A. 8).]²⁰

Thus, in accord with this statement, it is settled law that a reviewing court may not "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *N.L.R.B. v. Walton Mfg. Co.*, 369 U.S. 404, 405. We submit that pursuant to these principles the Board's finding of

(C.A. 9); *N.L.R.B. v. West Coast Casket Co., Inc.*, 205 F. 2d 902, 906-907 (C.A. 9); *N.L.R.B. v. Melrose Processing Co.*, 351 F. 2d 693, 698 (C.A. 8).

²⁰ Accord: *N.L.R.B. v. Pine Products Corp.*, 361 F. 2d 480 (C.A. 9), and cases cited *supra*, n. 19.

discriminatory motive here is amply supported by the record, is reasonable, and is therefore entitled to enforcement.

A. The discharge of employee Cox.

It is clear from the record that Cox was a leading union adherent among the Company's employees. He signed a card early in the campaign, attended union meetings, held union meetings in his home, persuaded other employees to sign authorization cards, and was the representative among the Company's employees on the Union's policy committee (R. 348; Tr. 184-187, 395-397).

It is equally clear that the Company was aware of Cox's union adherence, or at least believed that he was responsible for the Union's advent in its casino. Thus, Musso stated on several occasions to different employees that he knew who the union adherents were (Tr. 373, 212, 110-111). Moreover, shortly before Cox's discharge, Musso approached a group of employees and offered to bet a roll of money that Cox was the "instigator" of the union activity in the casino (*supra*, pp. 5-6).

Within a few days of this incident, Cox was discharged, assertedly because he made an obscene remark during a work-related quarrel with a supervisor. Although Cox's remark may have provided a justifiable ground for discharge, we submit that the evidence in this case amply supports the conclusion of the Board that the Company's motivation in discharging Cox was actually to rid itself of the "instigator"

of the union activities, not because of the remark.²¹ Indeed, this Court has found the presence of the factors discussed above—i.e., the employer's knowledge of the employee's union adherence, coupled with the timing of the discharge—to be persuasive in inferring discriminatory motive “notwithstanding the existence of justifiable grounds which, under other circumstances, might have permitted dismissal.” *N.L.R.B. v. Tonkin Corp. of California*, 352 F. 2d 509, 511 (C.A. 9). Moreover, the record here plainly shows the Company's hostility toward the Union, couched in warnings that employees at other casinos had been discharged because of union activities, threats to close down the casino operations if the Union came in, and coercive interrogation of employees regarding their union adherence (*supra*, pp. 18-21). Significantly, as discussed above, Cox was the recipient of much of this hostility shortly prior to his discharge.

More important, that it was Cox's union activity which actually brought about his dismissal is vividly evidenced by the statement of Company officials when Cox sought to appeal his discharge. The Company general manager, Dobson, in a conversation with Cox about his discharge stated that Cox was discharged because of his attitude; but Dobson then went on to establish what he meant, stating “Cox, you've got a big mouth. You think you are going to change the

²¹ This court has often stated that “the existence of some justifiable ground for discharge is no defense if it was not the moving cause.” *N.L.R.B. v. Security Plating Company*, 356 F. 2d 725, 728 (C.A. 9), and cases cited therein. Accord: *Aeronca Mfg. Co. v. N.L.R.B.*, — F. 2d — (C.A. 9) (decided Nov. 1, 1967, Docket No. 21,305).

gambling industry overnight. We are going to be here long after you and the Union are forgotten" (R. 350; Tr. 212). It was at this point that Dobson asked Cox why he wanted to work for "someone who doesn't want you? You are working for Mr. Hanley [the Union agent] now" (R. 350; Tr. 213). At this same meeting, Musso informed Cox that the Company knew the names of all the "trouble-makers" in the club, and then informed Cox that he had been observed sitting on the stage at the last Union meeting (R. 350; Tr. 212). And when Cox discussed his discharge with Gaughan, the Company president, explaining what had provoked him to make the obscene remark, Gaughan's response was solely in the context of union activities. Gaughan stated that the "gambling business was a close-knit fraternity", that if Gaughan so desired it "would be awfully difficult" for Cox to obtain further employment in the industry, and that "If it came to a showdown with the Union" he would rather close the "pit" completely (R. 349; Tr. 208-210).

Furthermore, under the circumstances, the Company's objection to Cox's remark appears exaggerated. Chiara, the individual at whom the remark was directed, had no objection to Cox's reinstatement and informed Company officials of this 2 days after the incident. He even stated on that occasion that Cox was a competent and honest worker, and was not the only employee to use profanity (R. 350; Tr. 218, 372). Also, in his few months on the job Chiara had been involved in three other incidents, with employees other than Cox, which caused him to walk off the job in anger and leave the casino; no such reaction followed Cox's

remark (*supra*, p. 10, n. 13). Finally, at the reinstatement discussion, Chiara declined to single out Cox as a trouble-maker, but said that he (Chiara) “had trouble” with all the dealers (*supra*, p. 10).²²

In sum, we submit there is substantial evidence on the record as a whole to support the Board’s finding. In light of the Company’s belief that Cox was the Union “instigator”, its hostility to the Union’s advent, its coercive threats and interrogation of Cox and other employees immediately around the time of Cox’s discharge, the timing of the discharge in relation to the Company’s knowledge of the union activities, and the statements of Company officials after the discharge linking Cox with the Union, the Board was clearly justified in finding that the discharge was motivated by discriminatory reasons.

²² The argument made in the Company’s brief (Br. p. 10)—that Chiara discharged Cox directly as a result of the swearing incident—is based solely on evidence which was explicitly discredited by the Trial Examiner and the Board (R. 347-348, 351-352), and is therefore without force here. This Court has long ruled that it is not “obliged to give weight to testimony which the Board, in the rightful exercise of its function as arbiter of the facts, rejected as not worthy of credit.” *N.L.R.B. v. Radcliffe*, 211 F. 2d 309, 315 (C.A. 9), cert. denied, 348 U.S. 833; and cases cited *supra*. p. 22. Moreover, in making this resolution, the Examiner properly drew an adverse inference from the company’s refusal to call Chiara, a management representative who was present at the hearing (Tr. 240), to corroborate its story. See, *N.L.R.B. v. Radcliffe*, *supra*, 211 F. 2d at 315; *Paudler v. Paudler*, 185 F. 2d 901, 903 (C.A. 5), cert. denied, 341 U.S. 920; *Interstate Circuit v. U.S.*, 306 U.S. 208, 225-226.

B. The discharges of employees Cantalamessa, Jones, Conner and Waggoner.

As shown in the Statement, less than a week after Cox's discharge, the Company discontinued the weekday operation of the No. 2 crap table, and discharged 4 employees, all union adherents; it reopened the operation about a month later, without recalling the discharged employees (*supra*, pp. 12-13).²³ The Board found that the evidence belied the Company's contention that its closing of the table was economically motivated, and concluded that the Company singled out the 4 employees for discharge because of their union adherence. Relevant record evidence establishes a *prima facie* showing of discriminatory motivation behind these discharges. Thus, three of the discharges, Cantalamessa, Jones, and Waggoner, along with Cox, were the employees principally responsible for the organization of the Company's employees; and the fourth dischargee, Conner, participated as well (Tr. 292, 313-315, 317-318, 395-397). As discussed above, Supervisor Musso stated to different employees on several occasions prior to the discharges that he knew who the union adherents were (Tr. 212, 110-111, 373), and Company officials engaged in coercive threats and interrogation of some of the dischargees and other employees shortly before the discharges were effected (*supra*, pp. 18-21). Moreover, none of the dischargees worked on the No. 2 table, which was operated primar-

²³ The discharges occurred June 28. The Company had decided in May to operate the No. 2 table for a weekday shift from 3 p.m. to 11 p.m. Until then, the No. 2 table had been open only on weekends. The No. 1 table was open 24 hours per day, 7 days per week (*supra*, p. 12, n. 15).

ily by “break-ins”, but were singled out for discharge even though they were top-rated dealers (*supra*, p. 12).²⁴ Furthermore, the timing of the discharges—less than two weeks after the Union’s petition for representation—and the Company’s hostility to the Union are relevant evidence of discriminatory motive (*supra*, pp. 26, 18-21).

More important, the reason advanced by the Company for discontinuing the weekday operation of the No. 2 table “fails to stand under scrutiny,” and thereby further evidences discriminatory motive. *N.L.R.B. v. Dant & Russell*, 207 F. 2d 165, 167 (C.A. 9). First, the Company contends that it closed down the weekday operation of the No. 2 table on June 28 because it found the operation unprofitable (R. 353; Tr. 517-519). Yet, Company records show that the No. 2 table had winnings of \$15,415.00 in June, when it was kept open on weekdays; later, after the table was reopened on weekdays, the Company kept it open although it earned only \$3,360.00 in August and consistently *lost* money each month throughout the remainder of the year (R. 353-354; RX 6-12). Also, Company records counter the Company’s assertion (Br. pp. 14-15) that the volume of business on the No. 2 table, averaging about \$1,000.00 per shift, was insufficient to justify the continued operation of the table: these records show that during the period after the table was reopened in August, the \$1,000 volume was rarely reached except for weekends, but the Company kept the table open

²⁴ Three of the discharges received top pay of \$22.50 per shift, and Conner received \$20.50 per shift (Tr. 601, 312, 279, 280).

throughout the period (RX 8-12).²⁵ Moreover, the Company's reopening of the table in August appears implausible in light of the reasons given for originally opening the table on weekdays. The Company asserted that it decided in May to open the table on weekdays because the volume of business on the No. 1 table was high and because it anticipated that the volume would increase sufficiently to accommodate another table (R. 353; Tr. 513-515). But the conditions in July (the month upon which the Company based its decision to reopen) were less favorable than in May,²⁶ and no sound reason was offered to explain why the Company, after purportedly closing down the table in June because it was "unprofitable," would reopen the table a month later (R. 353-354).²⁷ Accordingly, in light of

²⁵ E.g., in August, the volume of business on No. 2 was less than \$1,000.00 on 20 of the 28 days it was open on the day shift, and on 17 of the 27 days it was open on the swing shift (RX 8); in September, the volume of business was less than \$1,000.00 in 21 of 29 days shifts, and 16 of 24 swing shifts (RX 9). The figures for October, November, and December are similar (RX 10-12).

²⁶ Company records show that the volume of business on the day and swing shifts on table No. 1 in July was \$30 less than the volume in May, and the weekend earnings on No. 2 table were \$6,000 less in July than in May (R. 353-354; RX 5, 7, 17, 19). Thus, the Company cannot contend that a greater volume of business justified the reopening in August.

²⁷ The explanation in the Company's brief (p. 17) of the August reopening is misleading. The Company there contends that a lower overhead was created by (1) reducing the bet limit and by (2) using "break-in" dealers. However, the record shows that the bet limit was reduced in May (Tr. 516), and thus was in effect when table No. 2 was in operation in June, and that "break-ins" were also used on No. 2 in June (R. 352-353; Tr. 183, 113, 279, 311-312). Therefore, both factors urged in the Company's brief as creating a lower overhead were present during the June operation of No. 2 table on weekdays.

the Company's failure adequately to explain why it closed down the weekday operation of table No. 2, its failure to explain why it reopened that operation, and the evidence of discriminatory motive in discharging the 4 employees upon shutting down the weekday operation, we submit that the evidence amply supports the Board's finding that the Company was not motivated by economic reasons in closing the No. 2 table and discharging the four employees, but instead was motivated by a desire to rid itself of union adherents.²⁸

²⁸ In any event, without regard to the Company's motive in shutting down the weekday operation of table No. 2, the Board found that the individual reasons given by the Company for singling out the 4 dischargees were not sufficiently credible to dispel the prima facie case of discriminatory motivation established by the General Counsel (R. 354-356). Thus, the Company's contention that Jones was discharged because he was the "youngest \$22.50 crap dealer" (R. 354; Tr. 545) is belied by evidence that two other dealers were hired at \$22.50 after Jones was hired on December 3, 1963 (Tr. 564, 570-571, 564). Nor is there merit to the Company's contention that Cantalamessa was discharged because of incidents relating to his honesty, or that Waggoner was discharged because of a drinking problem. The Company never mentioned its dissatisfaction to these employees, paid them the highest wages of any dealers, and endured the alleged problems until their union activities came to light (R. 354-355; Tr. 568- 569, 323-325, 542-544). And the vague contention that Conner was discharged because "he wasn't coming along good enough" (Tr. 545) is further weakened by evidence that the Company paid Conner next to top pay for dealers. Therefore, in the absence of convincing reasons for singling out the four dischargees, the Board concluded that discriminatory motive was established even if the closing of the No. 2 table was motivated solely by legitimate business considerations (R. 356). See, *N.L.R.B. v. Radcliffe*, *supra*, 211 F. 2d at 313-314 (C.A. 9); *N.L.R.B. v. Jackson Tile Mfg. Co.*, 282 F. 2d 90, 92-93 (C.A. 5).

C. The Company's procedural objections to the findings as to employees Waggoner, Conner, and Jones are without merit.

In the brief, the Company contends that procedural infirmities should void the Board's findings as to three of the discharges. As we discuss below, none of its contentions are meritorious in the circumstances here.

1. The Company contends (Br. pp. 6-7) that the Board erred in allowing an amendment to the complaint in July 1965 to include employees Conner and Waggoner, who were discharged in June 1964. The Company's contention is that the discharges occurred more than six months prior to the filing of an amended charge, and therefore are time-barred under Section 10(b) of the Act.²⁹ This contention is without merit, however, as the original charge in this case, alleging the same violations of the Act as to other employees, was filed within six months of the discharge of Conner and Waggoner, and under the circumstances, "it was permissible for the second amended charge to relate back and define more precisely the original, timely charge." *N.L.R.B. v. Stafford Trucking, Inc.*, 371 F. 2d 244, 250 (C.A. 7), citing *N.L.R.B. v. Gaynor News Co.*, 197 (F. 2d 719, 721 (C.A. 2), affirmed, 347 U.S. 17, and *N.L.R.B. v. Epstein*, 203 F. 2d 482, 485 (C.A. 3), cert denied, 347 U.S. 912.³⁰

²⁹ Section 10(b) provides that " * * * no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board . . ."

³⁰ The chronology of the events was as follows: the original charge was filed on June 29, 1964, alleging that Cox was discriminatorily discharged on June 22, 1964; on October 19, 1964, the first amended charge was filed, alleging that Cantalamessa and Jones were

It is well settled that a charge filed with the Board does not have to set forth in detail each act believed to violate the statute. As the Supreme Court has stated: "A charge filed with the Labor Board is not to be measured by the standards applicable to a pleading in a private lawsuit. Its purpose is merely to set in motion the machinery of an inquiry." *N.L.R.B. v. Fant Milling Co.*, 360 U.S. 301, 307. Indeed, as noted in *Consumers Power Co. v. N.L.R.B.*, 113 F.2d 38, 42 (C.A. 6), "the Act contains no specification of what constitutes a proper charge, save that it shall state that respondent has engaged, or is engaging in any unfair labor practices affecting commerce." Also, the function of a charge " * * * is not to give notice to the respondent of the exact nature of the charges against him * * *. The charge, rather, serves merely to set in motion the investigatory machinery of the Board. It is largely for the benefit of the Board, not the respondent, so that it may intelligently determine whether and to what extent an investigation is warranted. Consequently, the Board has considerable leeway to found a complaint on events other than those specifically set forth in the charge * * *." *Texas Industries, Inc. v. N.L.R.B.*, 336 F.2d 128, 132 (C.A. 5). Thus, Section 10(b) of the Act " * * * has been uniformly interpreted to authorize inclusion within the complaint of amended charges—filed after the six months' limitation period—which 'relate back'

illegally discharged as of June 28, 1964; on July 7, 1965, the second amended charge was filed, alleging that Conner and Waggoner were discriminatorily discharged on June 28, 1964. The General Counsel issued a complaint on April 21, 1965, to include the discharges of Conner and Waggoner (R. 334-335; R. 3-9, 21, 26).

or 'define more precisely' the charges enumerated within the original and timely charge." *N.L.R.B. v. Gaynor News Co.*, *supra*, 197 F. 2d at 721, and cases cited. Accord: *N.L.R.B. v. Stafford Trucking*, *supra*, 371 F. 2d at 249-250.

It is plain here that the second amended charge merely adds two additional discriminatees to those named in the timely first amended charge, and all were assertedly discharged by the Company because of the same circumstance, the closing of the weekday operation of the No. 2 crap table. Therefore, the second amended charge does not raise new and different issues, and the Board properly included the charges in the amended complaint. See, *Kansas Milling Co. v. N.L.R.B.*, 185 F. 2d 413, 416 (C.A. 10); *Texas Industries, Inc. v. N.L.R.B.*, *supra*, 336 F. 2d at 132; *N.L.R.B. v. Reliance Steel Products*, 322 F. 2d 49, 53 (C.A. 5); *N.L.R.B. v. Raymond Pearson, Inc.*, 243 F. 2d 456, 458-459, and cases cited (C.A. 5).

2. Equally without merit is the contention (Br. p. 13) that the findings as to Conner and Jones are unsupported because they failed to testify. As shown above, credited evidence established that Conner and Jones actively participated in the union organizing effort and that the Company's motivation was not lawful in shutting down the operation of the No. 2 table and singling out four union adherents for discharge. The testimony of Conner and Jones was not essential to these findings: the sole issue to be resolved was the actual motivation for the discharges, and neither employee was competent to present direct evidence as to

that. See, *Bon Hennings Logging Co. v. N.L.R.B.*, 308 F. 2d 548, 554 (C.A. 9).³¹

Moreover, the law is clear that the Act seeks to protect public rights rather than private rights, and that the Board is empowered to proceed with a case even contrary to the desires of a discriminatee. *Nabors v. N.L.R.B.*, 323 F. 2d 686, 691 (C.A. 5), cert. denied, 376 U.S. 911. See, *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 193, and cases cited. In the instant case, however, the failure of Jones to appear is fully explained. The hearing was held 14 months after Jones' discharge; in the interim he had moved to Ohio, and could not be located by the General Counsel in order to return to the hearing (R. 355; Tr. 5-7). Also, Conner was scheduled to be called as a final witness by the General Counsel, and was present outside the hearing room (there having been a sequestration of witness) for that purpose. But when the General Counsel sought to call Conner to the stand, he could not be located (R. 355; Tr. 7-10, 607, 613). In all the circumstances, we submit that the failure of Jones and Conner to testify in no way affects the Board's findings with regard to their discharges.³²

³¹ Competence to present direct evidence of motivation distinguishes the Board's treatment of these employees' failure to testify from its treatment of Supervisor Chiara's failure to testify (Co. Br., p. 12). Chiara failed to testify as to whether he discharged Cox directly as a result of Cox's remark, a matter as to which Chiara had particular knowledge (*supra*, p. 28, n. 22).

³² Nor is there merit to the Company's contention (Br. pp. 7-10) that the Trial Examiner was biased. As this Court recently noted in rejecting a similar contention, "[i]t has been pointed out by the highest authority that rejection of an opposed view, even when total, 'cannot of itself impugn the integrity or competence of a trier of fact.' *N.L.R.B. v. Pittsburgh S.S. Co.*, 1949, 337 U.S. 656, 659 . . ." *N.L.R.B. v. Phaoston Instrument & Electronic Co.*, 344 F. 2d

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue denying the petition for review, and enforcing the Board's order in full.

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National Labor Relations Board.

CERTIFICATE

The Undersigned Certifies that he has Examined the Provisions of Rules 18 and 19 of This Court and in his Opinion the Tendered Brief Conforms to all Requirements.

MARCEL MALLET-PREVOST,

Assistant General Counsel,

National Labor Relations Board.

855, 859 (C.A. 9). Contrary to the Company's contention (Br. p. 8), the Examiner's statement that Conner may have failed to testify for fear of being blacklisted by other casinos is not evidence of bias (R. 355). Indeed, the Examiner used the very terms which Company President Gaughan expressed to employee Cox (Tr. 209-210), and it was entirely reasonable for the Examiner to conclude that Conner, a friend of Cox's and present at the hearing, would be aware of Gaughan's statement.

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8 (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization;

Sec. 10 (e) The Board shall have power to petition any court of appeals of the United States, . . .

within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record

Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

APPENDIX B

This appendix is prepared pursuant to Rule 18(f) of the Rules of this Court. References are to pages of the original transcript of record (“Tr.”).

General Counsel’s Exhibits

No.	Identified	Offered	Received
1(a) through 1(o)	25	25	25
2	330
2(a) and 2(b) (identified above as “2”)		340	340
3	341

Respondent’s Exhibits

No.	Identified	Offered	Received
1	500	509	509
2	511	511	512
4 through 12	512-513	513	513
13 “ 15	530-531	531	531
16 “ 19	531-532	532	532
20 “ 22	532-533	533	533
23 “ 24	533-534	534	534

No. 21362

In the
United States Court of Appeals
For the Ninth Circuit

EXBER, INC., d/b/a El Cortez Hotel,	}
<i>Petitioner,</i>	
VS.	
NATIONAL LABOR RELATIONS BOARD,	}
<i>Respondent.</i>	

Petitioner's Opening Brief

FILED

SEP 29 1967

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OCT 6 1967

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STATEMENT OF THE CASE

On April 21, 1965, the Board issued an unfair labor practice Complaint against Petitioner, a Nevada Corporation, operating a hotel, restaurant and gaming casino alleging violations of Section 8 (a) (1) and (3) of the Act. (R. Vol. I, p. 6) This Complaint was issued upon an unfair labor practice charge filed on June 29, 1964, by the American Federation of Casino and Gaming Employees (hereinafter referred to as Union). Said charge merely alleged that the Petitioner unlawfully discharged William Cox. (R. Vol. I, p. 3)

Thereafter on October 19, 1964, the Union filed a first amended charge alleging that Louis Cantalamessa and Robert Jones were unlawfully discharged on June 28, 1964. (R. Vol. I, p. 4)

Four months after the Complaint had issued on July 7, 1965, the Union filed a second amended charge, which was in fact a substitute charge re-alleging its previous allegations and further alleging that David Conner and David Waggoner were discriminatorily discharged on June 28, 1964, almost one year prior thereto. (R. Vol. I, p. 8)

On July 28, 1965, the Complaint was amended to add the names of Conner and Waggoner as alleged discriminatees. (R. Vol. I, p. 26)

A hearing was held in Las Vegas, Nevada, on August 10, 11, 12, and 13, 1966, before Trial Examiner Maurice S. Bush, who just the week prior thereto had heard a similar type case in Las Vegas, Nevada, involving Hotel Conquistador, Inc. d/b/a Hotel Tropicana and the Union.¹

At the hearing Petitioner moved to dismiss the amendment to the Complaint alleging the unlawful terminations of Conner and Waggoner on the basis that it was time

1. 159 NLRB No. 105.

barred under the provisions of Section 10 (b) of the Act. (R. Vol. II, p. 36) In addition, evidence was submitted that William Cox was terminated because of an admitted vile and profane utterance to his immediate Supervisor in the presence of other employees and customers. (R. Vol. II, p. 433)

Petitioner adduced substantial evidence all of which was un rebutted, that as a result of economic conditions a second crap table was reduced from a seven day a week operation to a weekend only operation. This situation resulted in personnel overstaffing, and thus the supervisors and managing shareholders of the Petitioner met and jointly selected persons for termination. (R. Vol. II, pp. 536-538)

Uncontradicted evidence was introduced that Louis Cantalamessa was selected for termination over the objection of his friend, Supervisor Paravia because there had been several reported instances where Cantalamessa's integrity had been questioned. In addition, it had been noted that Cantalamessa had presented himself for work one day, with an ice pick in his shoe and further, had recently become involved in a personal feud with Supervisor Faccinto. (R. Vol. II, pp. 539 & 540)

David Waggoner was selected for termination because he had begun to inbibe and as a result thereof admittedly on many occasions failed to report for work. (R. Vol. II, p. 544)

Robert Jones, who failed to appear at the hearing and rebut any evidence, was terminated because his ability to perform dual functions was limited. (R. Vol. II, p. 545)

David Conner, who like Jones failed to appear at the hearing, was a new employee, but in the short time he was employed demonstrated an inability to perform his work properly. (R. Vol. II, p. 545)

In addition to Jones, Conner, Cantalamessa and Waggoner, Harry Mills, also a dealer, was terminated, even though his seniority was greater than any other employee, but it was not alleged that he was unlawfully terminated.

In addition to the evidence regarding the terminations of the above named persons, evidence was introduced regarding conversations between supervisors and some employees which were alleged to be in violation of Section 8 (a) (1) of the Act.

The Trial Examiner, as he had done in Hotel Conquistador d/b/a Hotel Tropicana case, *supra*, concluded that not one witness presented by Petitioner was credible. He further concluded that the substitute charge, hence the amendment to the Complaint, was timely despite Section 10 (b) of the Act. Also, he found that William Cox was not terminated because of his admitted vile and lewd remark to his Supervisor, but because of his Union affiliations which purportedly became known to Petitioner during a conversation several weeks before his termination with another Supervisor.

With respect to the terminations of Jones, Conner, Cantalamessa and Waggoner, he ruled that the closing of Crap Table No. 2 was merely a pretext and that the terminations of these individuals, even though Jones and Conner failed to appear at the hearing, was motivated by anti-union considerations, not because of any affirmative evidence rather because Mr. Dobson, was unbelievable. He also stated that even if the closing of the crap table were economically justified there could not have been an overstaffing of personnel and these men were unlawfully terminated.

The instant Petitioner for Review is directed towards the Board's affirmation of the Trial Examiner's decision.

SPECIFICATION OF ERROR

(1) The Board's Order which dismisses Petitioner's Motion to Dismiss that portion of the Board's Amended Complaint, alleging the unlawful termination of David Conner and David Waggoner, notwithstanding that the unfair labor practice charges supporting said allegations were not filed until one year after their terminations is contrary to law, as specifically provided at Section 10 (b) of the Act.

(2) The bias and hostility of the Trial Examiner deprived Petitioner of due process of law.

(3) The Board and Trial Examiner erred in finding that Petitioner engaged in certain unfair labor practices in violation of Section 8 (a) (3) and (1) of the Act by discriminating with respect to the tenure of employment of William Cox, despite his vile, lewd and obscene remarks to his supervisor because said finding is based on misstatements of fact, a failure to credit uncontroverted testimony, and on inferences unsupported by the evidence.

(4) The Board and the Trial Examiner erred in finding that Petitioner violated Section 8 (a) (3) and (1) of the Act by discriminating in regard to the tenure of employment of David Conner and Robert Jones because neither of said persons appeared at the Board's hearing and therefore said finding is based merely on allegations without proof and further that said finding disregards Petitioner's un rebutted, uncontroverted evidence.

(5) The Board and Trial Examiner erred in finding that Petitioner engaged in certain unfair labor practices in violation of Section 8 (a) (3) and (1) of the Act by discriminating with respect to the tenure of employment of Robert Jones, David Conner, Louis Cantalamessa and David Waggoner because there is no evidence in the record to indicate

or support any finding that said persons were terminated for any reasons prohibited by law and further said findings were in complete and total disregard of the unrebutted, uncontroverted evidence of Petitioner.

(6) The Board and Trial Examiner erred in finding that its Supervisor Albert Faccinto unlawfully interrogated employees concerning their Union activities within the meaning of Section 8 (a) (1) of the Act because the testimony in support of said allegation was inherently incredible and contrary to the clear preponderance of the evidence.

(7) The Board and Trial Examiner erred in finding that Petitioner violated Section 8 (a) (1) of the Act when it found that Supervisor Paravia unlawfully interrogated employees Waggoner and Alcini because testimony in support of said finding is inherently incredible and contrary to the preponderance of the evidence.

(8) The Board and the Trial Examiner erred in finding that Petitioner violated Section 8 (a) (1) of the Act when it found that Supervisor Thomas Musso unlawfully interrogated an employee concerning his Union activity, threatened an employee with economic discharge or economic reprisals because of his Union activity and gave the impression that employees' Union activities were under surveillance because the testimony in support of said findings is inherently incredible based on non-existent conversation and contrary to the clear preponderance of the evidence.

I. The Amendment to the Complaint Adding Conner and Waggoner as Alleged Discriminatees Was Time Barred Under Section 10 (b) of the Act.

As heretofore pointed out, on July 7, 1965, the Union filed a second amended charge which in fact was a new and substituting unfair labor practice charge alleging that David

Conner and David Waggoner were discriminatorily discharged on June 28, 1964.

Thereafter, the Board moved to amend the Complaint and added Conner and Waggoner as alleged discriminatees.

Petitioner has continuously urged that in view of the late filing of the unfair labor practice charge relating to Conner and Waggoner approximately one year after their terminations, the amendment to the Complaint clearly and flagrantly ignores the mandate of Section 10 (b) of the Act. (29 U.S.C.A. § 160 [b]) The six month statutory limitation on the Board has been ignored. *Local Lodge 1424 IAM v. NLRB*, 362 U.S. 411.

The second amended charge filed by the Union on July 7, 1965, was in fact a substitute charge alleging new unfair labor practices, to-wit: the unlawful discharges of Conner and Waggoner. Accordingly, the second amendment to the Complaint should have been dismissed. *NLRB v. Vare*, 206 F.2d 543.

II. The Board's Order Which Adopted the Decision of the Trial Examiner Reveals on Its Face the Hostility of the Examiner Towards the Legal Gaming Industry of Nevada and This Hostility Has Deprived Petitioner of Its Right to Due Process of Law.

One week immediately preceding the formal hearing the instant cause, the Trial Examiner heard and subsequently decided a similar type case involving another Las Vegas resort hotel and casino. (R. Vol. I, p. 4) In his decision therein, not a single Employer witness was found to be credible no matter what the testimony.

In the instant case, he has again found that not one single Employer witness to be truthful despite corroboration and exhibits.

History reveals that it is not uncommon for Trial Examiners of the National Labor Relations Board to make blanket resolutions of credibility. Rarely, however, are such resolutions based on the obvious bias and vindictiveness which we urge exists here. The bias and prejudice demonstrated by the instant Trial Examiner, which even he did not try to conceal, is not only directed at Petitioner, but at the entire legal Nevada gaming industry.

The most dramatic exhibition of the Trial Examiner's hostility and prejudice was his statement:

"The evidence as heretofore noted, shows that the gambling industry in the Las Vegas region is a close knit fraternity and accordingly, fear of repercussions on his job opportunities may be responsible for Conner's absence at the time Government Counsel was ready to call him as a witness." (R. Vol. I, p. 23)

Where in this entire record is there any evidence to support this gratuitous, uncalled for and prejudicial conclusion?

The Trial Examiner was obviously unable to restrain his feelings when it came to the written word and thus these feelings cast grave doubt on his objectivity in assessing the entire case. A hearing conducted by a biased or prejudiced officer of an administrative tribunal is a denial of constitutional due process of law and nullifies the proceedings before the agency. This rule is supported by the many cases cited in *National Labor Relations Board v. Phelps*, 136 F.2d 562, 563 and well described in the following quotation from that case:

". . . for a fair trial by an unbiased and non-partisan trier of the facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceedings by an administrative functionary as when it is done by a judge. Indeed, if there is any

difference, the rigidity of the requirement that the trier be impartial and unconcerned in the result applies more strictly to an administrative adjudication where many of the safeguards which have been thrown around court proceedings have, in the interest of expedition and a supposed administrative efficiency been relaxed. Nor will the fact that an examination of the record shows that there was evidence which would support the judgment, at all save a trial from the charge of unfairness, for *when the fault of bias and prejudice in a judge first rears its ugly head, its effect remains throughout the whole proceedings*. Once partiality appears, and particularly when, though challenged, it is unrelieved against, it taints and vitiates all of the proceedings, and no judgment based upon them may stand."

In the case just cited recourse was had to the transcript to demonstrate the hostility of the hearing officer. In this case, that is not necessary; it is necessary only to read his decision. No unbiased person could have written the invective it contains. No unbiased Trial Examiner could have found that the failure of General Counsel's witness to appear was because of his fear of "repercussions" while he found that one of Respondent's witness failure to appear was because he could not corroborate other testimony. No unbiased Trial Examiner could have found all Employer witnesses in two separate cases involving the Nevada gaming casinos to be totally incredible. No unbiased Trial Examiner could have found two persons discriminatorily discharged when neither of them appeared at the hearing. And certainly no unbiased Trial Examiner could have reached some of the nonsensical conclusions as he did as will be more fully described hereafter.

Bias and prejudice by the Trier of Facts has reared its ugly head and has vitiated the whole proceedings. In fact, because of his patent bias, prejudice and hostility towards the Employer and the industry involved in the subject proceedings, the Trial Examiner should have properly and ethically disqualified himself before the trial commenced. To have done otherwise was a disservice to the parties litigant and to the agency he represents.

III. William Cox Was Terminated for Using Repulsive, Vulgar and Obscene Language Towards His Supervisor and for No Other Reason.

William Cox was terminated for cause on June 22, 1964, by Joe Chiarra, his supervisor, for using indecent, profane, vulgar and obscene language towards Chiarra during the course of his employment. The remark, the height of vulgarity, was admittedly made by Cox, overheard by employee Wesley Kabush and made in the presence of customers. As a matter of fact Cox boasted to his former roommate and good friend, employee Al Belson, of having made such a remark. (R. Vol. II, p. 153)

Wesley Kabush, an employee of the El Cortez, who has no direct interest in the outcome of this case, clearly described the incident. In addition to explaining what Cox had admittedly said, he testified that at the end of the work shift, on June 22, 1964, Chiarra told Cox: "You don't know it, but you are through. Don't come back in the morning." To which Cox replied: "You don't have the authority to fire me." Chiarra then answered that Mr. Musso had given him the authority to terminate anyone who acted improperly. (R. Vol. II, p. 434)

It has been proven that immediately at the end of the shift on which Cox was terminated, Chiarra advised his supervisor, Mr. Musso, of Cox's reply to the termination,

to-wit: You don't have the authority to fire me. In obvious response thereto, Musso sought to telephone Cox and confirm Chiarra's action, but upon calling his last known residence, Musso was advised by Cox's former roommate, Al Belson, that Cox had moved out. (R. Vol. II, pp. 121, 434, 463, 464)

Cox and Belson pictured Cox as a cocky, intemperate individual who prided himself on antagonizing his supervisors, particularly Joe Chiarra. (R. Vol. II, pp. 124, 231) Belson described Cox as having "quirks" and Cox himself admitted that he reveled in aggravating the 68 year old Chiarra. Cox's demeanor on the witness stand, as well as his wife's characterization of him as being a "big-mouth" leaves no doubt that Belson's analysis is correct. (R. Vol. II, p. 412)

Cox first began harassing Chiarra after the latter replaced Belson as the Boxman. (R. Vol. II, pp. 102, 429) The general feeling among the crew was that Chiarra was incompetent, but only Cox is reported to have displayed patient antagonism. Cox believed that harassment, confusion and name-calling was the order of the day. Such conduct he admits. (R. Vol. II, pp. 124, 232, 412, 430)

Mr. Musso testified that on complaints from Chiarra he called the dealers together on at least three occasions to advise them that the Employer demanded that petty jealousies not interfere with the operation of the table. (R. Vol. II, p. 432) Wesley Kabush and Cox have verified the occurrence of meetings. (R. Vol. II, p. 225) Musso further testified that he did not know who Chiarra was complaining about, (R. Vol. II, pp. 468, 469) same evidenced by the fact that the admonitions to the dealers were couched in general terms and not directed at any one individual. (R. Vol. II, p. 432)

In view of Cox's conduct, an unbiased Trial Examiner would have concluded that Kabush's unrebutted testimony was ample proof of the facts. However, this Trial Examiner avoids the obvious and with mystical power suggests that it was Musso and not Chiarra who terminated Cox. Musso, he found, knew of Cox's Union affiliation and if Chiarra had testified he could not have corroborated Kabush.

At this juncture, let us note that the Trial Examiner gives an onerous connotation to Chiarra's failure to testify. However, later in his decision he finds that the General Counsel's failure to produce Jones and Conner is excusable. The Trial Examiner knew full well that Chiarra's testimony would have been cumulative. However, a logical and realistic finding such as that would have deodorized the atmosphere of prejudice created by the Trial Examiner.

Wesley Kabush was the sole witness in this entire case who had no interest in its outcome. His testimony is critical and should not have been ignored.

It is undisputed that the discharge of an employee for wrongful conduct is an inherent power of management and one that is protected by law. *Shell Oil Co. v. NLRB*, 196 F.2d 637. The Act does not condone conduct which is disruptive between Employer and employee relationships. *Caterpillar Tractor Co. v. NLRB*, 230 F.2d 357. If an employee provides his employer with cause for discharge, the Board cannot save him from the consequences of his action by showing the employee was pro-Union or that the Employer may be anti-union, which certainly is not the case herein. If an employee is insubordinate and also engaged in Union activities, it does not destroy the just cause for discharge. *NLRB v. Birmingham Publishing Co.*, 262 F.2d 2. (See also: *NLRB v. Soft Water Laundry*, 346 F.2d 930; *NLRB v. Bluebell, Inc.*, 219 F.2d 796; *Gulf Coast Transit Co. v. NLRB*,

No. 332 F.2d 28; *Farmer's Co-op Co. v. NLRB*, 208 F.2d 296; *NLRB v. Longview Furniture Co.*, 206 F.2d 274; *NLRB v. Polynesian Arts*, 209 F.2d 846.

IV. The Board's Finding That David Conner and Robert Jones Were Discriminatorily Terminated Is Without Evidentiary Support Particularly in View of Their Failure to Appear at the Hearing.

The Board's finding that David Conner and Robert Jones were discriminatorily discharged under the circumstances of this case represents a classical innovation in the law.

Neither Jones or Conner appeared at the hearing, despite several months' notice. Thus, there exists nothing in the record to rebut Mr. Dobson's explanation of why they were terminated.

In his decision, the Trial Examiner ruled Dobson to be incredible despite his uncontroverted testimony with respect to these two persons. Notwithstanding, the Trial Examiner apparently "feels" that because he does not believe Petitioner's witness, a mere allegation in the Complaint is evidence of discrimination and thus the unlawful act of Petitioner is inferred.

Not only is the Board and Trial Examiner in error for ignoring Dobson's sworn uncontroverted testimony, *NLRB v. Atlanta Coca Cola Bottling*, 293 F.2d 320, but in the final analysis, they find Jones and Conner to have been unlawfully terminated because of the allegation in the Complaint. They have totally ignored that mandate of the Supreme Court as set forth in *Universal Camera Corp. v. NLRB*, 340 U.S. 474. Mere allegations do not constitute evidence.

This record is totally devoid of any evidence to support a conclusion that Jones and Conner were terminated for Union activities.

V. The Board's Findings That Jones, Conner, Cantalamessa and Waggoner Were Unlawfully Terminated Are Not Supported by Substantial Evidence on the Record Considered as a Whole.

In essence, the Board and Trial Examiner have concluded that Jones, Conner, Waggoner and Cantalamessa were unlawfully terminated, not because the reasons advanced for termination were untrue, but rather, because the testimony of Petitioner's General Manager, Dobson, which explained why the supervisors met to select persons for termination, is not to be believed, and thus it must have been for Union activity.

We respectfully suggest that a review of the facts is essential and will conclusively demonstrate the error of the Board, the bias of the Trial Examiner and the lack of substantial evidence supporting the Board's Order.

In 1962, Exber, Inc., purchased the El Cortez Hotel and Casino. From the time it first commenced operations to June 1, 1964, only Crap Table No. 1 was in operation on a full seven day a week basis with Crap Table No. 2 operating only on weekends. (R. Vol. II, pp. 513, 514)

In May, 1964, Mr. John D. Gaughan, President of the Employer and Mr. Dobson noted that the volume of business on Table No. 1 (also referred to as "drop") warranted the expansion of the hours of operation of Table No. 2 to a seven day a week schedule from 3:00 P. M. to 11:00 P. M. daily. (R. Vol. II, pp. 518, 519)

On or about June 4, 1964, the new schedule for Table No. 2 was placed into effect only on an experimental basis. However, after the second week of operation, Mr. Dobson noted that the "drop" was insufficient to not only provide a profit, but it did not even cover the costs of operating the table. As he testified since the table was averaging a daily drop of only \$1,000.00 and since the anticipated gross profit to the Employer would be only \$190.00 per day, the

earnings were insufficient to cover direct labor costs, state taxes and other overhead items. (R. Vol. II, pp. 517-522)
He said:

“(Dobson) The average labor expense, which would apply to craps, too, would be the cost of four dealers at approximate wage of \$20, which is a total of \$80. There is a box man who is in charge of the game that received a salary of approximately \$35 * * *” (R. Vol. II, pp. 14-18)

“The average box man’s wage is about \$35. The wages between the five men alone were \$115. In our particular case with craps, too, where you had a second game, we had to hire a third man to give the breaks to the two box men, which was an additional expense.”

“The other expenses of operation, if you are winning less than you anticipate, the State taxes you regardless of what your expense is. Their taxation is based on your gross and that is a sliding scale that begins at three per cent, and in addition you have other expenses for paraphernalia if the game is open and even operating below your expense volume you will still have customers that you buy drinks for and cigarettes, and you could total the expenses of this game and ascertain that it would not make us any money. It would be a very simple computation at \$190.” (R. Vol. II, pp. 518, 519)

In addition, the records reflect that in May, 1964, when Table No. 2 was in operation on weekends only, the drop was \$36,620. and in June, on a full week schedule, the drop was only \$35,625. (R. Vol. II, pp. 521-522)

In view of the fact that Table No. 1 was unprofitable, in the third week of June, 1964, Mr. Gaughan and Mr. Dobson determined that Table No. 2 should be returned to the original weekend only schedule. (R. Vol. II, pp. 517-522) Alfred Belson also recalled that business had slackened at this time. (R. Vol. II, p. 115)

At this juncture it is to be noted that the month of July is normally the busiest month of the year for gambling casinos in Las Vegas and it would be totally unbelievable to assume that any gambling casino would close down a crap table during this month and operate it on a limited basis merely as a pretext for anti-union conduct. (R. Vol. II, p. 116)

As stated above, the reduction in the hours of operation on Table No. 2 which was to occur the week ending June 28th left the Employer with an oversupply of dealers and, in addition, brought to light the fact that the overhead was in excess of what it should normally be. (R. Vol. II, p. 523) Accordingly, Mr. Dobson and Mr. Gaughan called a meeting in the third week of June, 1964, for the purpose of adopting cost saving devices which included reducing the number of dealers. (R. Vol. II, pp. 536-537) Present at this meeting were not only Mr. Gaughan and Mr. Dobson, but Messrs. Musso, Faccinto and Paravia who were the shift bosses. At this two hour meeting, the purpose of which was to reduce the number of employees and retain the most capable, it was decided that five dealers would be terminated. (R. Vol. II, pp. 536, 538) The ultimate decision, of course, was made by Messrs. Gaughan and Dobson.

Among those selected for termination was Harry Mills, a "21" dealer, who, though he had worked for Mr. Gaughan for a number of years, came to be known as a trouble maker.

Louis Cantalamessa was selected for termination over the objection of his life-long friend, Mr. Paravia, because, as Mr. Dobson had explained, there were several reported incidents wherein Cantalamessa's integrity was questioned. (R. Vol. II, pp. 539, 540) In addition, it was brought to light that Cantalamessa had once come to work with an ice pick in his shoe and also had become involved in a personal feud with Mr. Faccinto. (R. Vol. II, pp. 542-547)

Significantly, Cantalamessa did not resume the witness stand to deny the existence of the foregoing facts.

David Waggoner was selected for termination because he was regarded as being undependable and in gambler's parlance a "washout." (R. Vol. II, p. 544) Mr. Waggoner had a habit of consuming too much alcohol on pay-days and as a general practice failed to appear for work the following day. (R. Vol. II, p. 544) It should be noted that Waggoner admitted that on many occasions he failed to report for work, but offered the excuse of being ill. (R. Vol. II, p. 325)

Robert Jones, who failed to appear at the hearing, was selected for termination because he was the most recent \$22.50 per day dealer who dealt only one game. (R. Vol. II, p. 545)

David Conner, who like Jones, failed to appear at the hearing, even though subpoenaed by the General Counsel, was selected for termination because as a break-in dealer, earning less than \$22.50 per day, he demonstrated an inability to perform his work properly. (R. Vol. II, p. 545)

Mr. Dobson explained that when the table was returned to the weekend schedule on June 28, 1964, the above named employees were notified of their termination.

In view of Dobson's testimony, all of which stood uncontroverted in every respect, the Trial Examiner suggests that Dobson was incredible because of a subsequent reinstatement in August, 1965, of Crap Table No. 2 to the full week schedule. He totally ignores the fact that a contest was implemented, the bet limit was reduced, and, most important, break-in dealers were used; thus creating a lower overhead.

Dobson said:

"A. The policy for hiring dealers at the El Cortez is based upon breaking dealers in. The cost of operat-

ing a crap table or 21 table is identical everywhere in the city for each casino, regardless of the volume they do. Assuming that all the conditions are the same, which they are, it costs us just as much to operate a crap table as it does at the Fremont Hotel or the Mint. The only variance that would appear would be the wage structure. Otherwise, the cost of operating the table, obtaining the licenses from the State of Nevada and Clark County and the City of Las Vegas, are identical to that of the Fremont Hotel, the Mint, the Golden Nugget, any other operation. They only variance deviating from the cost of operation would be on the wage structure, and, obviously, the El Cortez operation isn't nearly as large as one of the larger ones, and, therefore, we adopt the policy of breaking in dealers who come to us and want to break in, and in exchange they work at a lower rate of pay, thereby providing them a way to learn a new trade and also permitting us to operate at a lower overhead.

Also we choose to break in dealers because it is not as expensive as if you were to break in a dealer at the Desert Inn, which is a large operation on the Strip. A game of that type where they have a high volume and you took a person to break him in on such a game, it would be very expensive.

In an operation of our size, which is a great deal smaller and is probably one of the smallest operations on Fremont Street, we can afford to break them in, because we do have a lower minimum. With this lower minimum, there isn't as much volume, and we take dealers and permit them to learn. Any mistakes they do while they learn the process isn't too costly, as it would be on the Strip. Therefore, that is the second reason for breaking in dealers, and at all times it has been Mr. Gaughan's stern policy to always have break-ins.

It has its disadvantages because it results in over-staffing, and therefore the shift bosses are in a position where they try to guess or gauge upon what might happen. The dealers don't show up or they get sick,

and we utilize these break-ins in many, many ways. Our main reason is in labor saving and at all times Mr. Gaughan says we will have them."

The Trial Examiner also suggests that Petitioner's failure to hire additional dealers when the table was restored to a seven day schedule in August, 1965, was further evidence of Petitioner's unlawful motivation. This novel assertion ignores Dobson's uncontroverted evidence that in late June, when Table No. 2 was reverted to weekends only, the overstaffing problem that had apparently existed became glaring.

As we have pointed out above, the positive testimony presented by Petitioner clearly proves that the decision to restore Crap Table No. 2 to a weekend only schedule was economically justified. In the face of such positive, uncontroverted evidence, the Board and Trial Examiner reach an unexplainable decision.

A careful consideration of the record will demonstrate the Board failed to meet its burden of proving the terminations of Jones, Conner, Waggoner and Catalamessa to be unlawful. *Universal Camera Corp. v. NLRB*, supra. There is nothing in the record to detract from Dobson's testimony. Whim of a Trial Examiner is even less of a reason.

VI. The Board's Finding That Supervisor Faccinto Unlawfully Interrogated Louis Cantalamessa Is Unsupported by Any Credible Evidence.

Louis Cantalamessa testified that on May 16, 1964, Supervisor Faccinto told him that he, Robert Jones, Peewee Alcini, and Faccinto's nephew should stay out of the Culinary Union until they saw what they were doing up at the Golden Nugget. He also testified that on June 23, 1964,

Faccinto again approached him and asked if he had joined the Union.

The Trial Examiner and Board credited Cantalamessa's testimony without regard to the facts that:

(a) Faccinto testified that he had no nephew or for that matter a nephew working at the El Cortez Hotel. (R. Vol. II, p. 457)

(b) Alcini did not testify as to any conversation about a Union so why would have Faccinto told Cantalamessa that he and Alcini and the *non-existent nephew* were to stay out of the Culinary Union. (R. Vol. II, pp. 144-148)

(c) On direct examination, Cantalamessa said that Faccinto mentioned the Culinary Union and that there was something about the Union being organized. (R. Vol. II, pp. 281, 289) On cross examination, Cantalamessa changed the date of the conversation and refused to state whether or not there was reference to the Culinary Union and added that he asked Faccinto if it would hurt him personally and that Faccinto said it would not. (R. Vol. II, p. 301)

(d) Cantalamessa admitted inconsistencies between the statement given to the Board Agent in his pre-trial affidavit and his testimony at the hearing.

(e) Cantalamessa admits to knowing Faccinto for twenty years and having talked to Faccinto every day on every subject imaginable, yet was able to recall only two conversations with Faccinto.

The foregoing item is really the key to Cantalamessa's incredibility. It was admitted by Cantalamessa that the Steubenville, Ohio group, including Faccinto, Cantalamessa, Paravia, Jones and Alcini, whose friendships date back to early childhood, socialized together on a daily basis. Their conversations touched upon every subject, including the Union. However, when Cantalamessa is able to come forward and testify with avowed specificity on direct exami-

nation, though contrary on cross examination, to comments of Faccinto's both of which total not over 50 words, it is totally and absolutely incredible. The Board and Trial Examiner have erred.

VII. The Board's Finding That Supervisor Paravia Unlawfully interrogated David Waggoner Is Unsupported by any Credible Evidence.

David Waggoner testified that on June 25th or 26th, 1964, he was speaking to Union Business Agent Truman Scott and was asked by Supervisor Paravia if he was in the Union, to which Waggoner replied: "If I was going to steal, I don't put it on the microphone." Paravia denied this conversation with Waggoner.

Since the testimony of the two is in direct conflict, why wasn't Union organizer Truman Scott called to the witness stand to corroborate Waggoner's testimony? We respectfully suggest that in view of Scott's failure to assume the witness stand, it must be presumed that his testimony, if adduced, would not have been favorable to Waggoner. *Interstate Circuit v. U.S.*, 306 U.S. 208.

VIII. The Board's Finding That Thomas Musso Unlawfully Interrogated William Cox Is Unsupported by any Credible Evidence.

As heretofore stated, a basis of the Trial Examiner's finding regarding the termination of William Cox was that Thomas Musso and not Joe Chiarra terminated Cox.

As support for that portion of his decision, the Trial Examiner has used an alleged incident occurring on June 18, 1964, between Cox and Musso as controlling when considering Cox's termination. The error is clear in this respect because this alleged incident was resolved by a credibility determination made in favor of Cox against Musso. However, the Trial Examiner's version of this

alleged incident is completely erroneous and contrary to law. He gives credence to General Counsel's witnesses, whose testimony is inconsistent, garbled, replete with inaccuracies, contradictory and at some points physically impossible.

The incident referred to is purportedly one occurring on June 18, 1966. The Trial Examiner in believing all of General Counsel's witnesses concluded that in that conversation Thomas Musso violated Section 8(a)(1) of the Act by interrogating Alfred Belson and William Cox, and thus provides him with a reason to find Cox's termination to be unlawful.

General Counsel's witness, Alfred Belson, testified that on the morning of June 18, 1964, a Thursday, he was sitting in the coffee shop of the El Cortez Hotel with Mr. Cox and another dealer when Mr. Musso, the Pit Boss, walked in and inquired of both Cox and Belson as to whether or not they had joined the Union. (No reason was given as to why the inquiry was not made of the third dealer). Belson testified that he answered: "No." and that Cox replied: "It wouldn't be such a bad idea." Cox, of course, did not testify as to ever making such a remark. (R. Vol. II, p. 190)

Immediately thereafter, Belson said that he looked at his watch and left the restaurant after he saw which way the conversation was going. (R. Vol. II, p. 107) Cox testified that Supervisor Anderson came in and advised Belson to return to the Pit. (R. Vol. II, p. 191)

Belson also testified that at the crap table together with Noonan, Franklin and Domino, at around 7:00 A. M. or 7:30 A. M. Musso walked up, took some money out of his pocket and said: "I will bet this to a penny, Billy Cox is a union organizer for this Union." (R. Vol. II, p. 108) Belson later

characterized the amount of money as being a "roll". (R. Vol. II, p. 610)

Belson further stated that at the time of the alleged occurrence he was unable to recall whether or not Cox was still living with him or not. (R. Vol. II, p. 120)

General Counsel's witness, Holmes Franklin, testified that between 7:30 and 3:15 A. M. while standing at the table with Noonan, Kabush and Belson, Musso walked up and said: "I will bet this to a penny that Billy Cox is a Union Representative." Franklin then testified that he saw Cox walk from the restaurant whereupon Musso picked up his money and walked away. He further stated that his regular day off was always Tuesday. (R. Vol. II, pp. 134-136)

General Counsel's witness, Frank Noonan, testified that he was the Boxman on June 18th and as such set in the Pit, facing directly South, towards the entrance to the restaurant. He further stated that Franklin was the stickman, standing directly opposite to him, facing the North end of the Casino and that Kabush was also at the table. He testified that around 7:00 A. M. Musso walked up to the table and said: "I will bet all of this that Cox is the instigator of this Union activity." He said that he then saw Cox walk from the restaurant whereupon Musso gathered his money and walked away. (R. Vol. II, p. 169)

William Cox testified that on June 18, 1964, at around 7:00 A. M. as he was beginning his 20 minute break, he, Belson, and Domino were in the coffee shop when Musso approached and asked him if he and Belson had joined the Union. Cox said that Belson, Franklin and Domino were working that day and that Wesley Kabush was on his day off. (R. Vol. II, pp. 189, 190)

According to Cox, immediately after Musso made this remark, Harold Anderson, Musso's assistant, entered the

restaurant and called Belson back to the crap table since it was time to reopen. (R. Vol. II, p. 191)

Cox then testified as to a general conversation between he and Musso about the Union in which he alleges Musso made anti-Union characterizations, *but at no time inquired of Cox's sympathies*. At this juncture, it must be noted that there is no evidence that Musso knew of any organizational drive at the El Cortez Hotel. Cox stated that at the conclusion of the conversation he and Musso walked out of the coffee shop together and walked into the pit and from there Cox said he went to the rest room, returned shortly thereafter and saw Musso at the table picking up money and walking away. (R. Vol. II, p. 189)

Now let us review the substantial inconsistencies and the contradictions between the stories given by all four of the above named persons relating to the alleged incident of June 18th as well as other factors bearing upon their credibility.

(1) Belson testified that Noonan, Domino and Franklin were present. Franklin testified that Noonan, Kabush and Belson were present. Noonan testified that Kabush and Franklin were present. Cox testified that Noonan, Franklin and Domino were present. **Kabush testified that he was off Thursday, June 18, 1964.** (R. Vol. II, p. 428)

(2) Franklin testified that Musso walked up to the table to make his fictitious wager between 7:30 and 3:15 A. M. Noonan testified that Musso walked up to the table and made his alleged wager around 7:00 A. M. Cox testified that at 7:00 A. M. he, Belson, and Musso were in the restaurant together and that at the time he was beginning his twenty minute break. (R. Vol. II, p. 191)

(3) Belson testified Musso walked up to the table when he made the alleged wager. Franklin testified that he saw

Musso walk alone from the restaurant directly to the table. Noonan testified that he saw Musso walk alone from the restaurant to the table and that he picked up his money after this alleged wager when Cox walked out of the restaurant. *Cox testified that he walked out of the restaurant and into the pit with Musso.* (R. Vol. II, p. 194)

(4) Franklin testified that he saw Cox walk from the restaurant in his position of a stickman, which necessarily faced the North end of the casino. Noonan testified that as a Boxman, he saw opposite the stickman facing South towards the restaurant and that he saw Cox walk out of the restaurant (it is a physical impossibility for both to have seen Cox walk from the restaurant.)

(5) Belson, Franklin and Noonan gave different versions of what Musso is alleged to have said.

(6) Noonan gave a written statement to the Board Agent on October 23, 1964, at which time he could not recall the time of this alleged occurrence. Yet, during the hearing, over one year later, he is not only able to recall the date of this incident, but the precise time. (R. Vol. II, p. 177)

(7) Belson testified that he could not recollect if Cox was still living with him in June, 1964. Cox testified that he had moved out of Belson's home nine months prior thereto. (R. Vol. II, p. 230) (How can anyone not know who shared his home and when?)

(8) Belson testified that he left Musso and Cox in the restaurant immediately after Musso made his alleged inquiries after having looked at his watch and seeing which way the conversation was going. Cox testified that Harold Anderson entered the restaurant and called Belson to the crap table. (R. Vol. II, p. 191)

(9) Belson first testified that Musso laid some money on the table when placing this fictitious wager, but later en-

larged his testimony and stated that Musso laid a "roll of money" on the table. (R. Vol. II, p. 610) It should be noted that no one, except Belson, characterized the amount of money as being a "roll."

(10) Holmes Franklin testified that he was off on Tuesdays. Cox and Kabush testified that Holmes Franklin was always off on Mondays. (R. Vol. II, p. 428)

(11) And last, but not least, Cox testified that Business Agent Hanley had never been in his home. (R. Vol. II, p. 237) Mrs. Betty Cox testified that Hanley had been in her home on at least two separate occasions. (R. Vol. II, p. 395)

Again, it should be obvious that the testimony of the General Counsel's witnesses was a garbled mess, replete with inaccuracies, inconsistencies, improbabilities, contradictions, and even physical impossibilities. Their testimony is the best proof that the statements attributed to Musso are false.

Thomas Musso was an entirely credible witness despite the somewhat disjointed manner in which he testified as to incidents which involved him. There is an inner consistency to not only what he said, but to his demeanor. He stood as a man who was falsely accused and he made no bones about it. He became excited at the injustice which others sought to foist upon him and became incensed at the false accusations.

Musso testified that there was no conversation with Cox in the restaurant at any time, but that on a Tuesday in June, 1964, he was in the coffee shop when Belson, Kabush and Domino entered (R. Vol. II, p. 464) Again, it is to be noted that during this time there had been considerable publicity in the newspapers, on T. V. and radio concerning the formation of this Union. (R. Vol. II, pp. 235, 236, 450, 493) In any event, Musso was totally unaware of any organizational drive at the El Cortez and significantly there is no evidence to the contrary. (R. Vol. II, p. 464)

On this particular Tuesday, Kabush approached Musso and asked him if he (Musso) had been in Kabush's shoes would he join the Union. Musso replied: "You do whatever is best for you and whatever you do will be all right with me." (R. Vol. II, pp. 466, 467) Kabush corroborated Musso.

Musso also testified that subsequent to the time Joe Chiarra became a Boxman, which it should be noted resulted in Belson's return to a dealer status (R. Vol. II, p. 429), there was considerable antagonism towards Chiarra by the crew which included Belson, Cox, Franklin and Kabush. (R. Vol. II, pp. 102, 429, 460, 461) It is no secret that these men thought Chiarra to be incompetent. (R. Vol. II, p. 429) Cox, in particular, delighted in confusing the 68 year old Chiarra on payoffs of bets and even admitted that he "liked to raise Chiarra off his seat." (R. Vol. II, p. 231)

Chiarra often complained to Musso of the trouble at the table, but never said who it was that was causing the problem. (R. Vol. II, p. 461) As a result of these complaints, on several occasions Musso called the crew together and admonished them concerning their relations with Chiarra and the petty jealousies which Chiarra reported. (R. Vol. II, pp. 461, 467) Both Kabush and Cox verified the occurrence of these meetings. (R. Vol. II, pp. 229, 230, 231, 431)

In any event, Musso explained that as a result of Chiarra's complaints, he began to observe the crew and on approximately June 18th, when Cox was on a break, he walked to the table and said: "I bet a dollar to a penny that Cox is the instigator of the trouble on this table," referring, of course, to the trouble with Joe Chiarra. (R. Vol. II. p. 467) The admitted silence of all the dealers at that point serves to substantiate that Musso pointed the finger at trouble-maker Cox, for in fact, all of the dealers knew of his admitted guilt.

After considering the testimony of the General Counsel's witnesses, as opposed to the credible testimony of Musso and the corroboration given it by Kabush who is the only disinterested witness in the entire case, we are forced to the apparent and inescapable conclusion that the "case against Musso" is nothing more than a fabrication and a crude one at that. The Petitioner rebutted all that could be rebutted and the balance fell because of its inherent incredibility.

After reading the Trial Examiner's account of the incident, one gathers the impression that the testimony of the Board's witnesses were clear, cohesive and quite understandable. He leaves the impression that not only is there a preponderance of evidence substantiating his finding, but in fact, there is no question at all.

We suggest that an unbiased Trial Examiner could not have reached that result.

Respectfully submitted:

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

FREDRIC N. RICHMAN

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH WAYNE STROOPS,)	
)	
Appellant,)	
)	
vs.)	NO. 21354
)	
UNITED STATES OF AMERICA,)	
)	
Appellee.)	
<hr/>		

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH WAYNE STROOPS,)
)
 Appellant,)
)
 vs.)
)
UNITED STATES OF AMERICA,)
)
 Appellee.)

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant to be guilty as charged in the second count of a two-count indictment, at the conclusion of trial by jury [C.T. 2-4, 6].¹

The offenses occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Section 3231, and Title 21,

¹

"C.T." refers to the Clerk's Transcript of Record.

United States Code, Section 174. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATEMENT OF THE CASE

Appellant and Thelma Davis were charged in both counts of a two-count indictment returned by the Federal Grand Jury for the Southern District of California. Count One charged both defendants with conspiracy to smuggle and conceal, etc., narcotics [C.T. 2-3].

Count Two alleged that appellant and Thelma Davis knowingly concealed, and facilitated the transportation and concealment of, approximately one ounce of heroin, a narcotic drug, which, as they then and there well knew, had been imported and brought into the United States contrary to law [C.T. 4].

Jury trial of appellant and Thelma Davis commenced on March 29, 1966, before United States District Judge Fred Kunzel. A motion to suppress evidence was heard and denied during the trial. The Court granted a motion for judgment of acquittal at the conclusion of the evidence [R.T. 5-6, 117, 161].²

2

"R.T. refers to the Reporter's Transcript of Proceedings on Appeal.

Appellant and co-defendant Davis were found guilty as charged in Count Two on March 30, 1966 [C.T. 5-6].

Thereafter, on May 16, 1966, appellant was sentenced to the custody of the Attorney General for five years. He subsequently filed a timely notice of appeal [C.T. 8, 16].

The conviction of co-defendant Thelma Davis was reversed upon appeal.

Davis v. United States, 382 F.2d 221 (9th Cir. 1967).

III

ERROR SPECIFIED

Appellant specifies eight points upon appeal, but his brief presents argument upon only three points:

1. Alleged insufficiency of the evidence.
2. Alleged unlawful search and seizure.
3. Alleged violation of Due Process of law in regard to discretionary powers of the United States Attorney's office.

IV

STATEMENT OF THE FACTS

STATEMENT OF THE FACTSA. THE MOTION TO SUPPRESS EVIDENCE.³

On January 28, 1966, United States Customs Agent Paul V. Martin observed a 1963 Chevrolet automobile that had just entered the United States from Mexico at the port of entry at San Luis, Arizona. Agent Martin's supervisor had instructed him to keep the vehicle under surveillance. The vehicle was stopped at the port but not detained for any length of time. Agent Martin followed the Chevrolet northward to Yuma, Arizona, where he lost sight of it for an estimated three or four minutes [R.T. 15-18].

Agent Martin then followed the Chevrolet westward until it stopped of its own accord at the California agricultural inspection station near Winterhaven, California [R.T. 16-17, 21-22]. All vehicles are stopped at this particular station. The occupants of the vehicle were appellant Stroops and Thelma Davis. Agent Martin asked them to leave the vehicle [R.T. 22, 27-29].

3

Part of the evidence relating to the motion to suppress evidence was heard by the jury. Such evidence may be considered upon appeal.

Carroll v. United States, 267 U.S. 132, 162 (1925).

About five minutes later, Customs Agent George F. Holleron examined the purse of Thelma Davis and found a loaded 25-caliber automatic pistol in the purse.⁴ Agent Holleron was the Acting Customs Agent-in-Charge at the Calexico, California, office, which also had Customs jurisdiction over Yuma, Arizona [R.T. 27-29].

Lieutenant Ramirez of the Imperial County Sheriff's office arrested Thelma Davis after the gun was found. Both suspects stated that the gun belonged to appellant Stroops, and he also was booked, being charged with a California concealed weapon offense [R.T. 32-34, 43-45].

Imperial County Deputy Sheriff Robert Russell transported Miss Davis to the Sheriff's substation in Winterhaven in a Sheriff's vehicle on that same evening. On the following day, Deputy Russell found the exhibit in question on the front seat of the same Sheriff's vehicle [R.T. 50-56].

Winterhaven was approximately 32 miles by road from the port of entry at San Luis. The Court took judicial notice of the fact that Winterhaven was not more than four or five miles from the Mexican border at Andrade, California [R.T. 101-102]. Agent Martin's surveillance of the vehicle

4

The jurors were instructed to disregard the evidence relating to the gun [R.T. 117-118]. However, it might be relevant upon the search and seizure question.

lasted for approximately 45 minutes [R.T. 16-17].

The Court held that the vehicle was under suspicion, that the first search was a border search, that the exhibit was abandoned by Thelma Davis during the automobile trip to the Sheriff's office, that Thelma Davis had no standing to require suppression of the evidence, and that there was no probable cause. The motion to suppress evidence was denied [R.T. 108, 116-117].

B. THE TRIAL.

United States Customs Agent Paul V. Martin observed a 1963 Chevrolet automobile that had just entered the United States from Mexico at San Luis, Arizona, on January 28, 1966. The Chevrolet was followed by Agent Martin as it passed through Yuma, Arizona, to the California inspection station near Winterhaven, California. The vehicle was out of Martin's sight for an estimated three or four minutes at Yuma [R.T. 15-17].

Appellant Stroops and Miss Davis were in the Chevrolet when it approached the Winterhaven inspection station. Miss Davis was arrested at that station by Lieutenant Ramirez of the Imperial County Sheriff's Office [R.T. 15, 27-29, 32, 45]. She was transported to the Sheriff's substation in Winterhaven in a Sheriff's vehicle operated by Deputy Sheriff Robert Russell [R.T. 50, 52-53, 60, 82].

Approximately 11 grams of heroin were found on the front seat of the vehicle on the following day [R.T. 53, 58, 86-90]. The heroin had a selling price of from \$100 to \$150 in Mexico [R.T. 90]. At approximately 5:00 p.m. on the previous day, January 28, the vehicle had been searched for "any weapons left or anything in the vehicle." This type of search is for "Possible pocket knives, or weapons of some kind, or anything that may be dropped in there by prisoners that we bring in." [R.T. 56-57, 71].

Between the time of the search and the moment that the heroin was found in the vehicle, the only persons transported in the vehicle were Thelma Davis, Acting Matron Hazel Chandler, and four officers -- Deputy Sheriff Robert Russell (who found the heroin), United States Customs Agents George Holleron and Paul Martin, and Lieutenant Ramirez of the Imperial County Sheriff's office [R.T. 26-27, 50, 52-53, 56, 58-59, 82].

Mrs. Chandler testified that she had never seen the heroin exhibit before [R.T. 82]. The heroin was found near the middle of the front seat, a little to the driver's side [R.T. 57]. When Thelma Davis was transported in the vehicle, she was in the middle of the front seat. Deputy Sheriff Russell was driving, Mrs. Chandler was in the front on the passenger side, and Agent Holleron was in the rear seat [R.T. 53]. Miss Davis was not handcuffed [R.T. 63].

Between the time that Miss Davis was transported in the

vehicle and the moment of the discovery of the heroin, Deputy Sheriff Russell left the vehicle upon the following four occasions:

1. At the Sheriff's substation at Winterhaven, California. The vehicle was unlocked and remained there for about 30 or 40 minutes. The area was lighted [R.T. 53-54, 68, 70].
2. At a coffee shop. The vehicle was there for not more than 20 minutes. It was not locked, but the area was well-lighted, and Deputy Sheriff Russell could see the vehicle from the inside of the building [R.T. 77].
3. At the substation during the night. The front doors were locked. The rear doors were not locked, but a screen sealed off the front seat from the rear seat, with some spacing above and below the screen [R.T. 53, 59-60, 63-64].
4. At the Post Office for not more than three minutes, during which time Russell was inside of the Post Office. The vehicle was parked right in front of the door and Russell could see it while he was inside of the Post Office [R.T. 54-55].

The heroin was found in a matchbox that was under a cool cushion that would normally move toward the center of the seat when a person entered the vehicle [R.T. 55-57, 67]. The officer did not remember whether he looked under the cool cushion when he previously searched the vehicle [R.T. 57].

During the transportation of Miss Davis, the matron attempted to perform her duties properly, but it was the first time that she had ever assisted in the transportation of a prisoner. Miss Davis had her hands in her lap "most of the time." [R.T. 84-85]

The matchbox obviously was from Mexico [R.T. 179].

Appellant Stroops gave a false name to the officers. He claimed that he was "John Edwards"; that he had come from Santa Monica, California, to San Luis, Mexico, and that he had borrowed the car from his cousin, "Joe Stroops." [R.T. 32-33]

He testified that he was with a friend named "Leroy" during part of the trip [R.T. 137]. He had made a similar statement to an officer, stating at times that the friend was "Leroy" and at times that the friend was "P.M. Johnson" [R.T. 149]. However, he testified that he did not remember the name "P.M. Johnson" [R.T. 137]. The name, "P.M. Johnson," was written on a piece of paper which was in appellant's wallet when appellant was searched [R.T. 155].

Appellant Stroops also told the officer that he had a couple of girls in San Luis, but he denied this when he testified [R.T. 136, 149-150].

V

ARGUMENT

A. APPELLANT HAS NO STANDING TO OBJECT TO THE SEARCH OF THELMA DAVIS'S PURSE.

Appellant Stroops contends that the discovery of the heroin in the officer's vehicle was the product of a previous search. This may or may not be correct, as the heroin was abandoned in the officer's vehicle. Officers have the right to move cool cushions in their own vehicles. The movement of the cool cushion resulted in the discovery of the heroin.

However, it is not necessary to decide whether the discovery of the heroin was the product of an abandonment which would allegedly be the product of an arrest which would allegedly be the product of a search of Thelma Davis's purse, resulting in the discovery of the gun. The solution of this involved legal question is unnecessary, as appellant Stroops has no standing to object to the search of another person's purse.

Diaz-Rosendo v. United States, 357 F.2d 124,
130-34 (9th Cir. 1966);

(5th Cir. 1963).

B. ASSUMING, ARGUENDO, THAT APPELLANT HAS
STANDING TO OBJECT TO THE SEARCH OF ANOTHER'S
PURSE, THE SEARCH WAS A LAWFUL BORDER SEARCH.

Appellant contends that the search which resulted in the discovery of the gun was not a lawful border search.

The vehicle had crossed the border into the United States and had been followed by a Customs Agent from the point of entry to the point of search. The search of the purse was conducted by a Customs Agent [R.T. 15-16, 27-29].

It has been held that a border search need not occur precisely at the border.

King v. United States, 348 F.2d 814 (9th

Cir. 1965), cert. denied, 382 U.S. 926

(1965);

Alexander v. United States, 362 F.2d 379

(9th Cir. 1966).

It also is well-established that probable cause is not required for a border search and that "mere suspicion" is sufficient.

Alexander v. United States, supra, at p. 382;

King, supra, at p. 817;

Rivas v. United States, 368 F.2d 703, 709

(9th Cir. 1966);

Bible v. United States, 314 F.2d 106, 108

(9th Cir. 1963);

Witt v. United States, 287 F.2d 389, 391

(9th Cir. 1961), cert. denied,

366 U.S. 950 (1961);

Blefare v. United States, 362 F.2d 870, 874

(9th Cir. 1966);

People v. Furey, 248 NYS 2d 460, 462 (1964).

The trial Court heard the evidence relating to the search and concluded that suspicion was present [R.T. 108]. No other conclusion would be reasonable, for the officer would not have followed the vehicle for approximately 32 miles if he had not been suspicious. Additional evidence of high suspicion by the Customs officers is found in the appearance at Winterhaven of the man who was temporarily in charge of the entire Calexico-Yuma Customs Agency office covering portions of two states [R.T. 27-28].

The test of a border search away from the border appears in this Court's recent opinion in Alexander, supra, at p. 382:

"Where, however, a search for contraband by Customs officers is not made at or in the immediate vicinity of the point of international border crossing, the legality of the search must be tested by a determination whether the totality of the surrounding

circumstances, including the time and distance elapsed as well as the manner and extend of surveillance, are such as to convince the fact finder with reasonable certainty that any contraband which might be found in or on the vehicle at the time of search was aboard the vehicle at the time of entry into the jurisdiction of the United States. Any search by Customs officials which meets this test is properly called a 'border search.'

The facts of the instant case clearly meet the requirements of Alexander. The time elapsed amounted to approximately 45 minutes of surveillance and an additional 5 minutes at Winterhaven [R.T. 16-17, 28-29]. The distance was not more than 4 or 5 miles from the Mexican border and approximately 32 miles from the point of entry into the United States [R.T. 101-102]. The latter figure is considerably less than the distance of 75 miles from the border (i.e., the Rio Grande River) to the point of search in Ramirez v. United States, 263 F.2d 385 (5th Cir. 1959), in which case the search was considered to be a customs "points of entry" search (at p. 387). (As an additional ground for affirmance, the Court of Appeals also held that there were reasonable grounds to believe that a crime was being committed). The

distance herein was less than half of the distance from the border in Jones v. United States, 326 F.2d 124 (9th Cir. 1963), in which the search occurred about 67 miles from the border. The concurring opinion of Judge Duniway, which was not inconsistent with the majority opinion upon the question, held that the search was a border search. This concurring opinion by Judge Duniway was cited with approval by this Court in Hurst v. United States, 344 F.2d 327, 328 (9th Cir. 1965), and in Alexander, supra, at p. 382.

The lapse of an estimated three or four minutes in the surveillance herein is similar in length to the lapse of possibly one or two minutes in Alexander, supra, at p. 382.

This Court has held that "there is reason and probable cause to search every person entering the United States from a foreign country, by reason of such entry alone."

Witt, supra, at p. 391 (emphasis added), quoted in King, supra, at p. 817; in Blefare, supra, at p. 874; and in Jones, supra, at p. 130 (concurring opinion).

C. THE PROSECUTING ATTORNEY'S DISCRETIONARY
AUTHORITY DID NOT VIOLATE DUE PROCESS OF
LAW.

Appellant contends that he was deprived of Due Process of Law by the delegation of power to the United States Attorney vesting discretionary authority to proceed under 21 USCA 174 or 26 USCA 4724.

The short answer to appellant's claim is that he failed to raise the issue in the trial Court.

Furthermore, appellant's claim has no support in the law. The two statutes involve separate offenses.

United States v. Garnes, 258 F.2d 530, 533
(2nd Cir. 1958).

There is no unconstitutional delegation of discretion to the prosecution. Congress properly "left the final choice in this matter to the discretion of the prosecutor."

Garnes, supra, at p. 533. (See also,
Witt, supra.)

Stating the matter differently, it is proper and desirable for litigants to have the opportunity of avoiding trial by means of compromise settlement. To prohibit this would be absurd.

D. ASSUMING, ARGUENDO, THAT THE EVIDENCE
WAS INSUFFICIENT, A NEW TRIAL SHOULD
BE PERMITTED.

Assuming, arguendo, that the evidence was insufficient to sustain the conviction of appellant Stroops, it is respectfully submitted that a new trial should be permitted.

The Government has additional evidence that was not utilized at the trial herein. This might well be sufficient, in view of the fact that the sufficiency of the Thelma Davis case was very close (she did not even raise the issue of

sufficiency of the evidence in her opening brief).

The closeness of the issue is also indicated by the results in other cases involving a separation between the suspect and the contraband. For example, in Galvan v. United States, 318 F.2d 711 (9th Cir. 1963), the heroin evidence was obtained from a load of garbage pulled out of a garbage truck by officers. The garbage had come from a trash can from a residence unconnected with the defendant, other than the fact that he and his vehicle came to rest on the front lawn of that residence after a wild flight from the officers. Residents had picked up the heroin at the front of the house on the morning after the flight, assumed that it was a quantity of marshmallows, and threw it into the trash. There was some other evidence, and the conviction was unanimously affirmed by this Court.

Other relevant cases are Ketchum v. United States, 259 F.2d 434 (5th Cir. 1958) (sack of marihuana found on side of highway), and Vaccaro v. United States, 296 F.2d 500, 504 (5th Cir. 1961) (marihuana found along side of road about 24 hours after suspect passed by in vehicle).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

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